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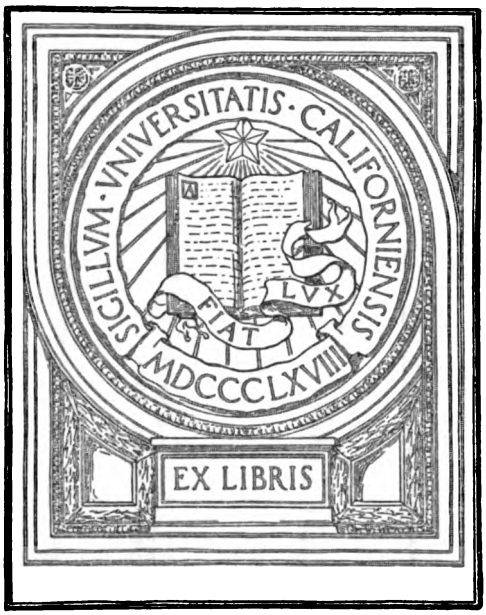

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The Lackawanna Jurist

Containing Decisions of the Supreme and Superior Courts of Pennsylvania and the Various Courts of Lackawanna County, Together with a Number of Cases Decided in Other Courts between January, 1908, and January, 1909.

VOLUME IX.

Edited by FRANK J. FITZSIMMONS,
A Member of the Lackawanna County Bar.

SCRANTON, PA.
1909.

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Edwin A. Warner vs. Rollin S. Myers, 150.

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The supreme court has said more than once, speaking of the Act of May 25, 1887, that as to all matters of substance, completeness, accuracy and precision are as necessary now to a statement as they were before to a declaration in the settled and time-honored forms. It is essential that the statement contain all the ingredients of a complete cause of action averred in clear, express and unequivocal language.

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The question of the constitutionality of the annexation act can be raised in the Court of Common Pleas.

In Re: Annexation of part of Lackawanna Township to the City of Scranton, 350.

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APPEAL.

Rule to Show Cause Why Appeal from a Justice Shall Not Be Stricken Off.

Where a defendant appeals from an award of arbitrators and omits the word "firmly" in his affidavit on supplemental affidavit can be received to supply the word "firmly" omitted in the original. But where costs are paid on the appeal and the plaintiff received them from the prothonotary such action constitutes a waiver of that undoubted defect.

The requirements of the act of March 25, 1903, P. L. 61, are for the benefit of the defendant and he may waive all of its provisions.

T. M. Field vs. B. D. Vail, 54.

City of Scranton vs. Charles L. Hawley, 65.

From Register.

An appeal to the Orphans' Court is the proper procedure when a will has been probated and it is desired to attack it.

While old age does not of itself incapacitate the testator from making a valid will yet such a state of mind as amounts to senile dementia does incapacitate one from making a will.

On appeal from the register, the Court may, in a proper case and without granting an issue, set aside the admission of a will to probate and revoke letters testamentary.

In Re: Estate of Adam Thompson, Deceased, 322.

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Among the corporate powers given to a city of the second class is the power for general revenue purposes, to levy upon pawnbrokers and to collect license taxes or fees to be fixed by ordinance. Therefore, a contention that in authorizing summary proceedings of a criminal nature with punishment by fine and alternative imprisonment overlooks the provisions of the Act of 7th March, 1901, P. L. 20.

City of Scranton vs. A. E. Rogers, 327.

ATTACHMENT.

Foreign—Rule to Quash.

Where personal property is attached the Act of Assembly requires that the sheriff shall make a declaration as to the property attached, "in the presence of one or more creditable persons of the neighborhood." Such a declaration is not required when land is attached.

"Actual possession" has a definite meaning in law. There is actual and constructive possession, or possession in fact and possession in law. The law annexes constructive possession to the legal titleor ownership of such property, but no actual possession.

Possession in fact exists where the thing is in the immediate "occupancy" of the party, his agent or tenant.

The omission of the word "actual" in the return of a sheriff in a foreign attachment proceeding is a substantial error.

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A foreign attachment is a severe remedy and the requirements of the law as to the return of service should be strictly complied with. No essential element should be left to implication.

W. W. Baylor vs. J. W. Baylor, Defendant, and W. W. Baylor, Garnishee, 75.

CASE STATED.

The adjustment of liabilities between two municipalities consequent upon a change in their territorial limits, territory being taken from one and annexed to the other, is a matter between the municipalities themselves and can in no way affect creditors, or third parties.

The proposition is a reasonable one that a creditor holding the bonds of a school district has a lien on all the property of the district and when land is taken from that district and annexed to another that he has the right to proceed against either or both districts until the debt is paid by one or the other.

The Act of 1887, P. L. 285, specially provides how such rights and liabilities shall be adjusted when adjacent tracts of land shall be annexed to a borough and, thereby, to a school district.

A. M. Harris vs. Taylor Borough School District, 355.

CERTIORARI.

A joint judgment against two or more is either good or bad as a whole. It is indivisable and incapable of separation. It cannot be affirmed as to one and reversed as to the others.

The New York Merchandise Co. vs. S. W. Arnold, et. al., 56.

Eastern Hat Company vs. S. W. Barasch, 66.

In the body of a transcript it appeared that the return was on oath. The constable's return did not appear to have been sworn to. The jurat was not signed bythe alderman. Held. That the alderman had jurisdiction both of the cause and the parties and that the record was entirely sufficient, as the body of the transcript showed that the return was on oath.

Commonwealth of Pennsylvania vs. Labatore Valazore, 78.

A joint service of a summons on two defendants by a copy left at "their dwelling house and handing it to an adult member of their family," was invalid.

Each defendant was entitled to service and the two could not be joined for that purpose.

Star Enameling Co. vs. J. W. Aitkin, et. al., a limited corporation, trading as The Rookery Trading Co., 187.

The penalty for trespassing on land posted as private property is regulated by the Act of 1905, P. L. 169.

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An action to recover such penalty should be brought in the name of the commonwealth to the use of the district; or, in the name of the person injured to the use of the school district.

This statute being penal in character must be construed strictly.

Chloe E. Tewsbury vs. K. E. Miller, 262.

COMMONWEALTH.

The object of the Act of 13th April, 1867, P. L. 78, was to afford a means of enforcing the performance of the husband's duty to support his wife to such extent as is necessary to keep her from becoming a public charge.

The court has jurisdiction under the Act to order a further sum to be paid if necessary to prevent the wife from becoming such a charge, even when the parties had separated by agreement which stipulated for the payment of a certain sum per month to the wife.

Commonwealth vs. Jacob Yerka, 27.

Commonwealth vs. Labatore Valazore, 78.

It is the undoubted right of counsel to entertain the opinion that a judge ought not to participate in the trial.

Where counsel's client had misgivings that a judge was incapable of giving him a fair trial, such misgivings ought to suggest to counsel the propriety of disclosing the same to the judge at an opportune time and in confidence.

Such misgivings were disclosed by counsel at the bar of the court after the case was called for thial and the selection of a jury had been directed to proceed.

Held: Whether such action was "with all good fidelity as well to the court as to the client," was not so free from doubt as could be desired.

The relation between an attorney and the court is pre-eminently one calling for mutual confidence and respect.

Testimony going to show bad reputation of a prosecutrix is admissible when it ante-dates the period covered by the indictment.

Where there is positive evidence of guilt of a character that doesn't admit of a reasonable doubt, proof of a previous good reputation no matter how well established, would not be sufficient to raise the doubt. To be of any avail the previous good reputation must be established as a fact and it must be proved to the satisfaction of the jury.

Commonwealth vs. Carl Howe, 113.

Commonwealth, ex. rel. Angelina McHale vs. Thomas P. McHale, 148.

Commonwealth vs. Kemmerer, et. al., 206.

There was no statute either creating or recognizing the office of borough solicitor, prior to the Act of April 25, 1907.

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That the town council was before said Act clothed with implied power to employ an attorney by the year, if in its discretion it saw fit, has never been doubted. Previous to the Act of 1907 a person who accepted such employment did so with the limitations annexed, namely, for a term of one year .

Commonwealth ex. rel. vs. W. A. Jennings, Quo Warranto, 210.

Comonwealth vs. Van Dyke, 259.

Commonwealth vs. DeMarzo, 289.

Conversion of a trust fund to any other use than that of the cestui que trust is prima facie fraudulent, and the trustee's failure to pay on settlement of his account is evidence of such conversion.

Commonwealth vs. A. F. Duffy, 340.

CONVICTION.

Appeal from Summary.

Persons living outside of the city cannot run their automobiles in going to or coming from their business, at a rate of speed prohibited by the ordinance and then when arrested plead want of jurisdiction because of non-residence. In order to convict a defendant of a charge of violating the ordinance the evidence must connect the defendant himself with the evidence.

City of Scranton vs. Charles L. Hawley, 65.

DEMURRER.

To Plaintiff's Statement.

In a case where the writing mentioned no consideration and none was averred in the declaration specific performance cannot be enforced.

Where the writing grants an option it is necessary that it should contain mutual and dependent covenants.

F. Kiple vs. M. Dinner, et. al., 87.

To Bill of Complaint.

The authorities are unanimous in the recognition of the abstract proposition that the legislature cannot, in the exercise of the right of eminent domain, even when the compensation is made on the most liberal terms, take the land from a private owner and appropriate it to any but a public use.

When such proceeding is attempted a bill of equity for an injunction is the proper remedy.

A public use is one which concerns the whole community in which it exists, as contra-distinguished from a particular individual or a number of individuals.

A railroad company, for its sole use, cannot appropriate water under the right of eminent domain.

George M. Watson vs. Anthracite Valley Water Company, 171.

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To Plaintiff's Statement.

A cause of action well pleaded is not vitiated by an erroneous averment as to the measure of damages.

A statement should include every ingredient of a good cause of action averred in clear, express and unequivocal terms and with completeness, accuracy and precision that were required at common law.

Use of John J. Becker vs. M. S. Jordan, 198.

To Plaintiff's Bill.

McCabe, et. al., vs. W. G. Scurry, et. al., 232.

DIVORCE.

Rule for a Mensa et Thora and Allmony.

Cruel and barbarous treatment which is a ground of divorce a mensa et thoro, under the Act of 1817, has been held to be actual personal violence to the wife or the reasonable apprehension of it; or such a course of treatment as endangers her life or health and renders cohabitation unsafe.

Mattie Warren vs. John Warren, 85.

Rule For.

Bad temper is not sufficient ground to warrant the Court to grant a divorce.

Marion Finch vs. Carrie Finch, 89.

Rule for Decree In.

It is erroneous to assume that a defendant's appearance by attorney who accepted notice of the rule to take testimony qualified the plaintiff as a witness as to the merits.

Mary McAvoy vs. George McAvoy, 190.

EQUITY.

Motion to Dismiss Plaintiff's Bill for Want of Due Prosecuton.

A motion to dismiss plaintiff's bill for want of due prosecution would not formerly be entertained by the court after reference. There is, however, good authority for the proposition that a contrary rule prevails at this time.

The failure or refusal of the plaintiff to prosecute his suit within a reasonable time will authorize its termination by the court in which it is brought, upon motion of defendant and against the will of plaintiff. There is nothing to differentiate an action in equity from one at law in respect to the power of the court to terminate the proceedings for laches. When neither party makes any move in a suit for a long time there is a natural and should be a legal presumption that the dispute has been settled and adjusted to the satisfaction of both.

William W. Patterson vs. John W. Williams, et. al., 1.

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Exceptions to Decree Nisi.

Where a company purchases land for its corporate uses as by condemnation proceedings it should appear that corporate action was taken authorizing the purchase or indicating what it was for.

The mere fact that the title is taken by deed to the corporation without any antecedent or subsequent corporate action tending to devote it to public use does not constitute dedication to a public use.

The power of eminent domain having been conferred upon a corporation for a specific purpose, a discretion to determine whether its exercise for that purpose is necessary being vested in a board of managers, some affirmative action by such board finding the existence of the necessity for the particular purpose is requisite to the legal exercise of the power.

Scranton Gas & Water Co. vs. Delaware, Lackawanna and Western Railroad Company, 37.

Rule to Vacate Decree Dismissing Bill and to Have the Bill Reinstated and to Allow Amendment.

The Court may, upon motion of plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable.

Terms will not be imposed when defendant has incurred no costs.

Sturges and Sanderson vs. The Scranton Railway Company, 56.

Gibbons vs. Lange, et. al., 58.

Haverly, et. al., vs. The School District of the Borough of Throop, et. al., 68.

By virtue of a deed the plaintiff came into peaceable possession of reservoirs and lands appurtenant thereto. Being so in possession plaintiff's status was equivalent to that of a riparian owner. That was decisive of its rights as against the defendant who was an upper riparian proprietor on a tributary stream.

Scranton Gas & Water Co. vs. W. C. Hall, 80.

Pellio vs. Bull's Head Coal Company, et. al., 95.

Fuller vs. Fisk, 123.

Plaintiff prayed for an injunction to restrain defendant from closing an alleged public street in a borough, by the erection of a fence.

Held: The plaintiff had the burden of showing such abandonment by the owner to public use as would show a clear intention to dedicate.

Where there is no evidence to warrant the conclusion that the land was ever dedicated to the public use by the defendant or any other owner, the right of private property can neither be divested nor impaired.

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Where there is no evidence to warrant the conclusion of adverse user by the public of the alleged way across defendant's land for the period of twenty-one years or any other length of time, the evidence is insufficient to support the theory of prescriptive right in the public.

The Borough of Olyphant vs. The Delaware & Hudson Company, 137.

Bill for Specific Performance of Contract.

Krajeski vs. Krzywicki, et. al., 143.

A wife never having entered into an agreement to join her husband in conveying land, cannot be compelled to execute a deed therefor.

The plaintiff having paid the expense of drawing the deed before he knew that the wife would not sign it, should be allowed to deduct that sum from the purchase money due; he cannot, however, deduct such expense as incurred after he learned that the wife would not sign the deed; nor for the loss of the use of the money which he had ready to pay on the same principle. He is, however, entitled to deduct the interest on the money paid down for the reason that the defendant had the use of the money.

Joseph Krajeski vs. Alexander Krzywicki, et. al., 143.

William H. Frank and Portia Frank, his wife, plaintiffs, and Thomas R. Young, et. al., Defendants, 158.

Watson vs. Anthracite Valley Water Company, 171.

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Pellio vs. The Bull's Head Coal Company, et. al., 271.

The Delaware & Hudson Company vs. The Borough of Olyphant, 274.

Hollister vs. The Erie & Wyoming Valley Railroad Company, 282.

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Rule to Show Cause.

The relief afforded by a decree in equity must conform to the case as made out by the pleadings as well as to the proofs. Every fact essential to entitle a plaintiff to the relief which he seeks must be averred in the bill. Neither unproved allegations nor proof of matters not alleged can be made a basis for equitable relief.

Henry Frey vs. Matthias Stipp, 351.

McCabe, et. al., vs. W. W. Watt, et. al., 359.

EJECTMENT.

The six months in which to bring an action of ejectment expired in October, 1907; but proof of the service of the rule was not filed until December, 1907.

On account of the delay the Court extended the time thirty days for defendant to bring her action of ejectment.

Stephen J. Healey vs. Margaret Healey, 60.

Rule to Show Cause Why Judgment in Ejectment Should Not Be Opened.

Plaintiff leased a store to defendant for "one year with the privilege of five." The lease contained a provision that "notice be given or required three months before the expiration of any one year by either party."

Defendant notified plaintiff that he desired to exehcise his option under the provision of said lease, and to remain therein as tenant for at least "one year" more.

Held: If defendant chose to except option he was bound to accept it as it was written, for five years, not for "one year at least."

Frances Penelly vs. B. S. MacDonald, 179.

McCabe, et. al., vs. Watt, et. al., 371.

ESTREPMENT.

Rule to Show Cause.

When a writ of estrepment is asked for the proper practice is to award the writ upon a proper showing, first requiring that security be given to the defendant as in case of a preliminary injunction, defendant to have the right to move to dissolve at any time after the issuing of the writ, and upon such motion to dissolve the court shall hear the parties upon the merits and make such further order as shall seem just and proper.

Thomas Morris, by his next friend, Margaret Birtley vs. Crad Morris, 258.

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Schooley vs. Crawford, et. al., 295.

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FI. FA.

Rule to Stay.

A certiorari was taken to the judgment of the alderman. The court affirmed the judgment. The defendant paid to the alderman the debt, interest and transcript costs. Plaintiff issued an execution for the costs that accrued in court. Upon a rule to stay fi. fa. court held that defendant was bound to know the legal effect of the affirmance and that the complete discharge of his liability could only be had by paying the costs taxed in court.

Alva J. Noble vs. John A. Toohill, 176.

GUARDIAN.

Sur Citation To.

A guardian will not be required to file an account of the estate of her late ward unless funds are shown to have come into her hands.

In Re: The Estate of Elizabeth Gibson, a minor, 265.

HABEAS CORPUS.

The mother's right to the custody, care and companionship of her child should not be interfered with except for substantial reasons affecting its welfare.

Commonwealth, ex. rel., Angelina McHale vs. Thomas P. McHale, 148.

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The Estate of Adam Thompson, deceased, 322.

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Annexation of Part of Lackawanna Township to the City of Scranton, 350.

INDICTMENT.

Rule to Quash.

Forgery is the false making or the materially altering, with intent to defraud, of any writing, which if genuine, might apparently be of legal efficiency, or the foundation of legal liability.

To constitute the crime it is essential that three things should exist: (1) There must be a false making or other alteration of some instrument in writing; (2) there must be a fraudulent intent; and (3) the instrument must be apparently capable of effecting a fraud.

Receipts which acknowledge the payment of money to apply on account do not admit of uncertainty. It is not necessary to aver that there was "an account" or an indebtedness between the parties. The receipts plainly imply such facts.

Commonwealth of Pennsylvania vs. Kemmerer, et. al., 206.

INJUNCTION.

Rule to Continue Preliminary.

Where plaintiff is owner and in possession of mineral rights, injunction is a proper remedy against threatened invasion; but where defendants are in possession the plaintiff must seek his remedy or establish his right at law.

A plaintiff in ejectment may have the right of estrepment to prevent the mining of coal, and the proceedings respecting such right are regulated by statute.

John Gibbons vs. F. W. Lange, et. al., 58.

Erie Railroad Company, et. al., vs. The Borough of Dunmore, et. al., 238.

Motion for Preliminary.

The Delaware & Hudson Company vs. The Borough of Olyphant, 274.

Rule For.

The right of an upper riparian owner to divert the waters of a stream for manufacturing or other purpose having no necessary relation to his use of his land, is limited as between himself and a lower proprietor, to so much of the water as will not materially or sensibly diminish its quantity.

Uncertainty as to plaintiff's right to equitable relief and long delay in applying for it, make it obligatory upon the court to refuse a preliminary injunction.

An injunction is not of right. It will not be issued when, upon a broad consideration of the situation of all parties interested good conscience does not require it.

Albert G. Hollister vs. The Erie & Wyoming Valley Railroad Company, 282.

Motion for a Preliminary.

Whether a contract for land required by a city for its public purposes is within

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the prohibition of the Act of 7th March, 1901, P. L. 20, Sec. 1, Art. XV., is by no means free from debt.

A preliminary injunction will not be granted except where the plaintiff's right is clear both on the law and the facts.

No new, doubtful or difficult question of law will be decided on a rule for a preliminary injunction.

It is not certain that a taxpayer's bill can be maintained for the prevention of a public nuisance.

John E. Regan vs. The City of Scranton, et. al., 293.

Mandatory.

McCabe, et. al., vs. W. W. Watt, et. al., 359.

INVENTORY.

Sur Exceptions To.

An inventory should contain a specific enumeration of the goods, chattels and credits of the decedant; and if general instead of specific in its details will be set aside.

In Re: Estate of Richard J. Gordon, deceased, 291.

JUDGMENT.

Rule to Open.

S. H. Williams, vs. John W. Williams, 11.

Rule to Strike Off.

An affiant acted on his own responsibility without leave to intervene on any claim to speak in behalf of defendant.

Held. Being an unauthorized intrusion upon the record the affidavit was an nullity and the plaintiff was at liberty to ignore it.

The Builders' Exchange of Scranton vs the American Surety Company of New York, 18.

Rule for—Non-Obstante Veredicto.

Rozelle vs. Lewis et ux., 22.

Rule for—Non-Obstante Veredicto.

Kiple vs. Reisman Bros., 61.

Rule For.

A court has no jurisdiction to open a judgment ten years after it was obtained before an alderman and five years after the transcript was entered in the Prothonotary's office.

M. P. Gillespie, Assigned to Thomas Shotten vs. R. C. Rhule, et. al., 67.

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Rule for Defendant Non Obstante Veredicto.

Toolin vs. City of Scranton, 91.

Rule for—Non-Obstante Veredicto.

Pennsylvania Coal Company vs. Dunmore Borough School District, 118.

Rule For.

Warner vs. Myers, 150.

Rule for, on Whole Record.

McDonald vs. McAndrew, 153.

Rule to Open.

Building Exchange vs. The American Surety Company, et. al., 196.

Rule For.

Corporations act through agents. The public is not informed as to the specific and private instruction which may be given to them, limiting their ostensible powers. A just protection to persons dealing with corporations imperatively requires that the act of the agent, within the general scope of the business with which he is entrusted, will bind the company, although the specific act might be in excess of his private instruction.

This doctrine would seem to apply with peculiar force where the parties are dealing with perishable fruit. In such case the shipper or consignee must act immediately or not at all.

John H. Short vs. The Delaware & Hudson Company, 253.

Judge vs. Pyle, 256.

Rule to Open.

A judgment was entered on a contract which provided, inter alia, that defendant should purchase for a certain term of years fifty per cent. of all liquors used in his hotel.

Defendant claimed, and was corroborated by the testimony of other witnesses, that he failed to make the purchase because the plaintiff company refused to sell him for the same price at which he could obtain the goods from other dealers. Upon this showing the court made absolute a rule to open the judgment.

Standard Brewing Co. vs. Guiseppe Saracino, 264.

Rule for—Non-Obstante Veredicto.

Peidich, et. al., vs. Alexander Grass, 330.

Golden vs. Mount Jessup Coal Company, 334.

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Rule to Strike Off.

Verdict was returned for plaintiff. Rule for new trial was argued and discharged. An appeal was taken to the Superior Court and the judgment of the lower court was affirmed. Defendant then moved to strike off judgment.

Held: The motion was too late as the defendant had had his day in court.

City of Scranton vs. Robert P. Koehler, 337.

United States Circle Swing Co. vs. Reynolds, et. al., 342.

Rule for—Non-Obstante Veredicto.

Gregory vs. Huslander, 344.

Jones vs. The Marion Coal Company, 379.

LIEN.

Sci. Fa. Sur Municipal.

The defendant dies before sewer ordinance was passed. Because of this the administratrix objected to the assessment and lien. Held: The administratrix of the owner of the property being in court, by her own act, and the proceeding being in rem, the objection cannot be sustained.

City of Scranton vs. Daniel Murray, et. al., 251.

MANDAMUS.

Motion to Quash Alternative Writ Of.

The County Commissioners are the fiscal agents of the County and the trend of legislation is to charge them with the responsibility of disbursing all County moneys and of making contracts which impose a liability upon the County, subject to the concurrence of the Controller as provided by the Controller's Act of 1895. Under the Act of 1891 all orders for the payment of the work and books necessary for new indices are to be drawn on the Treasurer by the County Commissioners, although the purchase of the books and the supervision of the work are left to the officers immediately concerned, that is, to the Prothonotary, Clerks of the Court, Register of Wills and Recorded of Deeds.

Jacob Lotz vs. John J. Durkin, Morgan Thomas and Victor Burschel, as Commissioners of Lackawanna County, 34.

PETITION.

To Amend.

It is error to style a widow an "administratrix" in an action to recover death benefits due the family of her deceased husband. The court will, in such case, permit an amendment by striking out the word "administratrix."

Sarah McHale vs. The Pine Brook Colliery Accidental Fund, 321.

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RE-HEARING.

Motion For.

Commonwealth vs. Jacob Yerka, 27.

STATEMENT.

Rule to Amend.

A cause is out of court when arbitrators are actually chosen and remains so until brought back by appeal.

Cheland vs. The Borough of Old Forge, 175.

TRIAL.

Motion for a New.

Doctors testified that plaintiff was permanently and incurably injured and that in time he would be a helpless paralytic.

Held: In view of this testimony it was not error to allow expert physicians to say, after thorough examination, that the plaintiff was simulating pain; or, in other words, that he was a maligner.

Edward Pahl vs. Township of Ransom, 9.

Rule for a New.

The general rule is that notice to an agent in order to effect the principal must have reference to business in which the agent is engaged by authority of his principal and within the scope of his agency.

The Hunt & Connell Co. vs. W. H. Clark, et. al., 20.

Rule for a New.

Defendant seriously controverted certain declarations of plaintiff's Grantor, now deceased and touching the boundary in dispute ,and upon which Plaintiff's case depends.

Held: That the verdict in favor of the plaintiff must settle the question because it was ample to warrant the conclusions arrived at. That there was no evidence of fraud on the part of the plaintiff or lack of knowledge on the part of the defendant and that all the plaintiff did was consistent with the claim made. The rule for a new trial was discharged, the motion for judgment non-obstante, denied and judgment ordered for plaintiff.

Orlando Rozelle vs. B. S. Lewis and Wife, 22.

Rule for a New.

Kiple vs. Reisman Bros., 61.

Reasons for a New.

The court will not disturb a verdict which is sustained by the overwhelming weight of the evidence.

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Schooley vs. Crawford, et. al., 79.

Rule for a New.

A city is not bound to make a culvert suitable to extraordinary conditions of the weather nor to answer for an error of the engineer's judgment in not providing for consequences that engineering skill and experience could not be expected to foresee.

There is no case that suggests that a municipality can take advantage of an error of judgment on part of a subordinate executive officer.

James Toolin vs. The City of Scranton, 91.

Motion for a New.

Commonwealth vs. Carl Howe, 113.

Rule for a New.

Weiss vs. Maryland Casualty Company of Maryland, 146.

Rule for a New.

It was error for the court to say that if the filling in a street remained for weeks that it necessarily convicted the borough of negligence. It was for the jury to determine whether, under the circumstances, such length of time was sufficient to charge them with notice.

William S. Nyhart vs. Taylor Borough, 339.

Commonwealth vs. Duffy, 340.

United States Circle Swing Co. vs. Reynolds, et. al., 342.

Gregory vs. Huslander, 344.

Millard, Ex'r, et. al., vs. Delaware, Lackawanna and Western Railroad Co., 346.

Where on the face of the paper title the location of the division line between the parties is open to dispute, the question must go to the jury if there is evidence tending to support the plaintiff's contention.

H. F. Traeger vs. Trustees of the Salvation Army, 353.

Rule for a New.

McDonald vs. McAndrew, 153.

Rule for a New.

Jenkins vs. Courtright 182.

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Weiss vs. Maryland Casualty Company of Maryland, 185.

Western Launch & Machinery Co. vs. Arthur Frothingham, et. al., 192.

Short vs. Delaware & Hudson Company, 253.

Commonwealth vs. Van Dyke, 249.

Lawson vs. The J. E. Hess Baking Company, 267.

The sufficiency of a declaration should be attacked by a demurrer. It cannot be attacked at the trial after plea in bar has been entered.

It is not error to allow proof of damages subsequent to bringing of suit.

The plaintiff asserted in her declaration that "her business of dressmaking and sewing had been injured," by the publication of the libel.

Held: Loss of earnings is a special loss.

Annie Gates vs. Richard Little, 285.

Motion for a New.

A declaration made by a prisoner to his victim on the day of the killing is admissable as evidence.

Where there is no evidence that the defendant suffered from maniacal outbursts, the court will not instruct the jury that if the defendant killed the deceased while under a spell or influence of a maniacal outburst he could not be convicted, although he knew his act was unlawful and that he knew the difference between right and wrong.

Commonwealth vs. Nicholas DeMarzo, 289.

Rule for a New.

Peidich, et. al., vs. Alexander Grass, 330.

Golden vs. Mount Jessup Coal Company, 334.

Jones vs. The Marion Coal Company, 376.

TRUSTEE.

Sur Exceptions to Account Of.

When the stock of a bank is bequeathed in trust for the use of a beneficiary for life with remainder over, the surplus fund accumulated during the testator's life, but not divided until after his death, belongs to the corpus of his estate, while that which accumulated after his death, is income and payable to the life-tenant.

In Re: Estate of Joseph C. Platt, deceased, 29.

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VIEWERS.

Exceptions to Report Of.

The remedy where viewers fail to award damages is by appeal.

In Re: Paving Sixth Avenue, Scranton, 84.

When it appears that neither public necessity nor occasion exists for a public road, court will sustain exceptions to a report of viewers and dismiss petition at the cost of the petitioners.

In Re: Road in Benton Township, 156.

In Re: Road in Newton Township, 194.

Exceptions to Report Of.

In Re: Paving, Grading and Curbing Vine Street, from Jefferson Avenue to Monroe Avenue, 244.

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In the Court of Common Pleas of Lackawanna County. No. 2

June Term 1892.

IN EQUITY.

MOTION TO DISMISS PLAINTIFF'S BILL FOR WANT OF DUE PROSECUTION.

William W. Paterson vs. John W. Williams et. al.

A motion to dismiss plaintiff's bill for want of due prosecution would not formerly be entertained by the court after reference. There is, however, good authority for the proposition that a contrary rule prevails at this time.

The failure or refusal of the plaintiff to prosecute his suit within a reasonable time will authorize its termination by the court in which it is brought, upon motion of defendant and against the will of plaintiff. There is nothing to defferentiate an action in equity from one at law in respect to the power of the court to terminate the proceedings for laches. When neither party makes any move in a suit for a long time there is a natural, and should be a legal presumption that the dispute has been settled and adjusted to the satisfaction of both.

Messrs. Wells & Torrey, for plaintiff.

Messrs. Willard, Warren & Knapp, for defendants.

Opinion by Newcomb, A. L. J.

December, 1907.

From the petition and answer coupled with certain matters of record therein referred to we gather the following:

FACTS.

April 13, 1892, the bill was filed. It is founded upon the alleged breach of a contract involving the right to a *pro rata* part of the capital stock of a certain corporate enterprise. The cause of action accrued within two years prior to the filing of bill. Defendants appeared by counsel, five by Mr. Davis and the sixth by Col. Oakford. Between May 17, 1892, and January 23, 1893, three demurred severally and the others answered jointly. No step has ever been taken to have the demurrers formally disposed of except it be by implication as hereafter shown. No replication was ever filed. April 26, 1893, counsel filed an agreement that Mr. Horn should be appointed master and examiner; same day the appointment was approved by the court.

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The next thing of record was the formal appearance by present counsel for all defendants, save Stone. This was October 18, 1898, and was occasioned by the death of Mr. Davis. That is the last thing of record until September 26, 1907, when by paper filed the plaintiff suggested the death of the defendant Benjamin Hughes, together with the name of his executor with a view to having the latter substituted as a party. That brought on this motion.

Nothing was done in pursuance of the master's appointment until February 26th, 1893. On that date the testimony of Mr. J. Sargent Price was taken in Philadelphia. Nothing further was done until October, 1898, when the testimony of the plaintiff was taken in chief. That was after the present counsel for defendant had succeeded Mr. Davis, then deceased. The cross-examination of the plaintiff was postponed at counsel's request "in view of the absence of Dr. Williams" (one of the defendants) "now residing in Wales, against whom this testimony is chiefly directed and until we can have opportunity to communicate with him." Thereupon the hearing was "adjourned to meet at some other time to be determined by the parties." Thereafter there was some negotiation for settlement between counsel both in person and by correspondence. This extended to the following July, 1899. At that time negotiations ended and nothing in the way of further hearing has ever "been determined by the parties," or attempted to be determined.

It is alleged by defendant that in addition to Mr. Hughes three material witnesses have in the meantime died, viz., N. Taylor, Reese G. Brooks and J. Sargent Price. The death of Taylor is not admitted and the fact cannot be ascertained as the case is now presented. Regarding the others their death is admitted, but as to Mr. Brooks the materiality of his testimony is denied, and as to Mr. Price the materiality of his death is denied because it was his testimony that was taken in 1895 and is still in the master's possession.

It was suggested at the argument that on his first appearance before the master, to wit, in October, 1898, the present counsel for defandants protested against going on with the trial on the ground of irregularity in the master's appointment. This suggestion is veri-

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fied by the transcript of the examiner's notes to which we have had access. It was conceded at the argument that Mr. Hughes survived sometime after the last hearing but that some years had elapsed since his death. Reference to the appointment of his executor shows the date of death to have been in April, 1900.

The motion is opposed on four grounds :—

1. That the practice of moving to dismiss for plaintiff's laches has become obselete by operation of modern rules enabling either party to speed the case;

2. That if the motion can be entertained at all it must be made before the master subject to the right of exception if disallowed;

3. Because the inference of laches from the premises is rebutted by the fact that the hearing was last adjourned to an indefinite time in the future at defendants' request and for their convenience; and

4. Because the right to make the motion was intercepted by plaintiff's prior move to get the case in shape for trial.

DISCUSSION

If merely irregular the appointment of the master might be a matter of no consequence and in any veiw of the case would not be properly before us for consideration. If it were erroneous, and therefore void, then its only effect would be to dispose of plaintiff's objection that this motion should have been addressed to him. We cannot say that it was erroneous. That would depend upon the character and effect of the agreement of counsel to refer. We haven't the benefits either of that or the terms of the order appointing the master, for neither is in the files. It must therefore be assured that the parties intended that the filing of replication should be waived and the issues of fact as raised by the bill and answer tried as to three defendants, and demurrer sustained as to the other three. We cannot say it was not competent for the parties to do that, and, if so, the appointment of the master would not be erroneous. The case would then lie outside the operation of the amended rules which went into effect March 1, 1894. For while we have no doubt that in providing that they should apply to all cases "put at issue on answer

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or demurrer on or after that date," (see 159 Pa., XXIX), a technical issue by replication or formal joinder was meant, yet we see no reason to think it was intended to interfere with cases where the right of counsel to waive that formality had been exercised before that date. Hence we need not consider the fact that no technical issue has ever been formed, because, no matter that present counsel might differ from his predecessor about the wisdom of such waiver, he would be bound by it unless upon timely application and for sufficient cause leave were given to withdraw it.

But the fact that we are driven to the assumption of waiver in order to sustain the appointment is not without some weight in determining the merits, to which reference will be hereafter made.

No authority is cited, nor is any found for the proposition that the motion must be first heard by the master. Neither can any reason for it be conceived unless it be the theory that he has exclusive jurisdiction of the cause and the parties. But that cannot be true. If it were, the plaintiff couldn't have come into court with his suggestion of defendant's death. That is only one example of various matters of practice illustrative of the court's continuing control of the case except for purposes of taking the proofs and reporting the master's conclusions upon the matters covered by the pleadings. It is believed that formerly the motion would not be entertained by the court after reference. But there is good authority for the proposition that a contrary rule prevails at this time.

Gordon vs. Gordon, 25 Ill., Ap., 310.
Saville vs. Frisbie, 70 Cal., 88.

These are cited in a foot note to the text in 6 Enc. Pl. Pr. 911, and are consistent with the general rule. It is there stated, page 904, as follows: "The failure or refusal of the plaintiff to prosecute his suit within a reasonable time will authorize its termination by the court in which it is brought, upon motion of defendant and against the will of plaintiff." We see nothing in the fact of reference, therefore, to prevent our consideration of the motion.

For the objection that it is now obselete reliance is had upon the authority of Becker vs. Ry. Co., 4 Pa. Sup. Ct., 372. It is there said in the course of the opinion that the remedy by motion to dis-

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miss has been superseded by more effective means of speeding the case now in defendant's hands by reason of the rules of modern practice. Examination of the case shows the question to have been qnite unessential to the point actually decided, which was that under the particular facts there presented, and the operation of a local rule of practice the plaintiff was in no default. The doctrine that the motion has been displaced by modern procedure was also intimated by Judge Beiller in Kase vs. R. R. Co., 12 D. R. 85. But again in that instance we can discover no intention to hold the facilities in defendants' hands for speeding trial in equity to be in all cases decisive as excluding inquiry into the question of plaintiff's laches. If either of these cases is to be regarded as laying down such rule it would be impossible to reconcile it with the current of recent authority as found in the decisions of our supreme court, unless there be some distinction in its application as between an action at law and one in equity. There is no rational ground for such distinction. It cannot rest upon any supposed advantage had by the defendant in equity over the defendant at law in the means of speeding the trial, for he has none. That the defendant could have used these means was true both in Huffman vs. Stiger, 1 Pittsh., 185, and Van Loon vs. Smith, 103 Pa., 238. In each the cause was at issue. In the Van Loon case the court said: "It is quite true that the defendants appeared to the scire facias, entered their pleas, formally took defense and that at any time within the twenty-one years since elapsed might have ordered the cases for trial; but the plaintiff enters the suit; it is his business to prosecute, the defendant's duty to defend." This was a *sci. fa.* to continue the lien of a judgment, but it involved the nature of the presumption of payment arising from the lapse of time, the grounds upon which the presumption rests and the shifting upon plaintiff of the burden of proof in order to excuse his apparent laches even though suit be pending during the time which gives rise to the presumption. Ruffman vs. Stiger was ejectment. Motion was made to substitute the heirs in place of plaintiff who had died at sometime, not disclosed, during the twenty-seven years that the cause had been in court. The attempt to revive the action in that way was refused by opinon of Chief Justice Black in the course of which he said, "When neither party makes any move in the suit for a long time:

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there is a natural, and should be a legal, presumption that the dispute has been settled and adjusted to the satisfaction of both." This together with Huffman vs. Stiger was cited with approval in Waring vs. R. R. Co., 176 Pa., 172, (1896), which was a motion for non suit for want of due prosecution, wherein the authorities were very fully reviewed. See also Neel vs. McElhenny, 189, Pa., 429 (1890).

It is apparent that both Huffman vs. Stiger and Van Loom vs. Smith were erroneously decided if the mere suggestion of death of one of the parties operates at law to intercept the right to move for non suit on the ground in question. On the contrary, if anything, it serves to bring into view the very reasons underlying the policy of the law in limiting the right of action by statute. It would be begging the question to say on the one hand that the power of the court in the premises springs from consideration of the vicissitudes to which human life and its concerns are subject by the mere lapse of time, and, on the other, that the suggestion of death seven years and upwards after the fact is effective to prevent the power being involved.

We find nothing in our own decisions to differentiate an action in equity from one at law in respect to the power of the court to terminate the proceedings for laches. Referring to the general rule as above quoted from 6 Enc. Pl. & Pr., 904, it is there added: "The rule applies to every kind of civil proceedings whether at law or in equity." And again on page 905: "A bill in chancery may be dismissed upon the unexplained default of the plaintiff in proceeding further with the cause within a reasonable time."

From the cases may be deducted the following principles of

LAW.

1. The court has the same power to order a compulsory nonsuit for delay in prosecuting an action at law that it has to make a general rule fixing the time when judgment of *non pros* will be entered on defendant's praecipe for want of declaration.

2. A presumption either of settlement out of court or abandonment of the cause arises from the lapse of many years of inaction on plaintiff's part unaccounted for.

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3. What precise length of time will make this presumption conclusive is not determined, but in the absence of statutory provisions on the subject must depend on the facts of each case.

4. In the exercise of its power the court's discretion must to some extent be guided by considerations of analogy derived from statutes of limitations.

5. The mere fact that defendant could have speeded the trial by using the means afforded by the rules of practice is not necessarily material.

6. The plaintiff's assertion that there was no intention to give up the suit is insufficient to account for many years' delay on his part where there has been nothing to prevent him from going on with it.

7. There is no reasonable ground of distinction with respect to the application of these principles as between a motion for non-suit at law and a motion to dismiss a bill in equity.

This brings us to the merits of this motion.

We have no hesitation in saying that prima facie the lapse of more than fifteen years without other effort to proceed than was made here, is negligence. Practically nine years elapsed without any attempt to go on with the trial. The defendant Hughes survived about eighteen months after the last hearing. That wasn't adjourned to an indefinite date to be determined by the defendants but "by the parties." No effort was ever made to secure another date by agreement. The only thing was some negotiation for settlement. But that ended upwards of eight years ago while all parties were living. While the failure of the negotiations may tend to repel the inference of settlement, it in no way excuses the long years of inaction thereafter which remains wholly unaccounted for. No necessity nor occasion to supend proceedings after July, 1899, is shown, but rather a case of mere neglect persisted in from that time till September 26th this year. In addition to the change of conditions due to the death of Mr. Hughes and of witnesses alleged to be material, the files are now missing. No doubt the bill and answer can be supplied because we have been furnished with copies. But the exact character of the reference, and whether replication was intended to

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be waived cannot be known. While resort may be had to presumption in order to support the reference, the necessity for that expedient contributes somwhat to the obscurity into which the case has fallen and to the disadvantages under which the defendant would now labor if it were to be revived.

Considering the desultory character of plaintiff's efforts to bring the case to trial, the lapse of time since any effort was made to proceed, and the failure to account for his delay, the inference is irresistible that for reasons which to him then seemed sufficient he saw fit to abandon the case years ago, and that under the circumstanes it would work injustice to defendants if he were permitted to revive it now.

"The affiant says he never abandoned the suit and always intended to have it tried and never directed a suspension of proceedings. Such averments are of the most trivial character. They are utterly at war with the actual facts of the situation, and as againist these facts they avail nothing. If he did not direct a suspension of proceedings he certainly did suspend them and practically abandon them for an unprecedented period without the slightest reason or necessity." Per Green, J., in Waring vs. R. R. Co., *supra*. True, the facts there presented a more flagrant case of laches than is shown here but the difference is in degree and not in essential principle.

The rule to show cause is made absolute and the bill dismissed.

A coal company which casts refuse materials into the waters of a stream, by which they are transported to the lands of a lower proprietor to his damage is held, in Day vs. Louisville Coal & C. Co. (W. Va.) 10 L. R. A. (N. S.) 167, to be liable to him therefor although other companies acting independently, have contributed to the injury by similar conduct.

Communistic life by the members of a religious corporation is held, in State v. Amana Society (Iowa) 8 L.R.A. (N.S.) 909, not to be contrary to public policy.

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In the Court of Common Pleas of Lackawanna County. No. 43 September Term, 1905.

MOTION FOR A RULE FOR A NEW TRIAL.

Edward Pahl vs. Township of Ransom.

Doctors testified that plaintiff was permanently and incurably injured and that in time he would be a helpless paralytic.

Held: In view of this testimony it was not error to allow expert physicians to say, after thorough examination, that the plaintiff was simulating pain; or, in other words, that he was a malingerer.

Messrs. P. J. Sherwood and A. A. Vosburg, for plaintiff.

Messrs. Clarence Balentine and Everett Warren, for defendant.

Opinion by Edwards, P. J.

December 30, 1907.

Of the numerous reasons assigned for a new trial one only appeals to us as having any merit. It relates to Dr. Longstreet's testimony. The doctor was testifying for the defendant, and, after he had described at length his examination of the plaintiff's physical condition, he was allowed to state that, in his opinion, the plaintiff was simulating pain; or, in other words, that he was a malingerer. Plaintiff's counsel contends that such a conclusion was for the jury and he calls our attention to several cases on this point. We have examined these cases, and we find that some of them sustain the contention of plaintiff's counsel to some extent. The cases examined by us are: Cole v. Railway Co., 95 Mich., 77; McCormick v. Detroit R. R. Co., 10 American Neg. Rep., 484; Harrold v. R. R. Co., 47 Minn., 17; Quaife v. Railway Co., 48 Wis., 513. Our attention has not been called to any Pennsylvania authority. We are of the opinion that no error was committed in admitting Dr. Longstreet's testimony. On this point the other judges agree with the trial judge.

It must be remembered that as far as plaintiff's alleged injuries were concerned there was an irreconcilable variance between the testimony on one side and the other. Plaintiff's witnesses, lay and medical, described the condition of the plaintiff from the time of the accident to the time of trial. The doctors testified that he was permanently and incurably injured and that in course of time he would

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be a helpless paralytic. At the former trial of the case plaintiff was brought into court on a cot. Defendant's witnesses, very numerous on this point, showed that the plaintiff was grossly exaggerating his condition, the doctors testifying that there was nothing the matter with the plaintiff, that he was in normal health and could walk like any other man without crutch or cane. In view of this testimony on the part of the defense and the contention of the defense on this point, we know of no reason why the expert physicians should not be allowed to say, after a thorough examination, that the plaintiff was simulating.

The case has been tried twice. The trial took ten days the first, and eight days the second time. The case was well and thoroughly tried on both sides. In our judgment the matter complained of and which has been but briefly discussed by us is of a trivial character.

The rule for a new trial is refused and an exception is noted for plaintiff.

An agent of a foreign corporation, whose contract of agency demands of him the exercise of judgment in the business matters of his principal, and who has charge of the business of his principal in the territory covered by his contract, is held, in Ord Hardware Co. vs. J. I. Case Threshing Machine Co. (Neb.) 8 L. R. A. (N.S.) 770, to be a managing agent within the meaning of a statute providing for the service of summons upon the managing agent of a foreign corporation.

One who purchases land which is subject to an usurious trust debt, and assumes the payment of such debt as part of the consideration for his purchase, is held, in Stuckey v. Middle States Loan, B. & C. Co. (W. Va.) 8 L. R. A. (N. S.) 814, to have no right to be relieved from the usury.

The construction of a dam to furnish water for sale, for irrigation purposes, and to generate power for sale to whoever applies for it, is held, in Spratt v. Helena Power Transmission Co. (Mont.) 8 L. R. A. (N. S.) 567, to be for a public purpose, for which the power of eminent domain may be exercised.

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In the Court of Common Pleas of Lackawanna County, No. 9 January Term 1908.

RULE TO OPEN JUDGMENT.

S. H. Williams vs. John W. Williams.

Plaintiff conveyed by quit claim deed his interest in a property to defendant for $3,500, to secure which a bond was given together with a mortgage as collateral. At the same time by instrument in writing for a nominal rental of $1.00, defendant demised the property to plaintiff for a term certain to-wit, from about the 26th of January, 1904 to April 1, 1905.

Judgment was entered for $3,500, founded upon confession in defendant's bond to No. 9 January Term 1908.

A clause in the lease reads: "That the said lessee shall and will pay the interest upon the mortgage debt unpaid or accruing up to April 1, 1905; that he will also pay all taxes unpaid and accruing up to that date which shall include one-fourth of the taxes for the year 1905; all insurance premiums or fractions thereof unpaid and accruing up to said date of April 1, 1905, as well as all electric light or power bills, all water and gas rates and renew any and all personal property leased to him hereunder and named in a certain inventory made for both parties hereto at their joint request on January 20 and 21, 1904, by substituting therefor property of equal value and in as good condition as that worn out, removed or destroyed as aforesaid, as well as also to keep in repair the building, machinery and fixtures therein and renew any broken parts or machinery, appliances or fixtures at his own expense."

Held: It is thus apparent that there is something more here than the ordinary obligation to make fair and tenantable repairs. The plaintiff was bound to restore the property both real and personal.

It is equally plain that he was bound to pay the interest on the mortgage, the insurance and taxes specified. To the extent that he has failed in these undertakings the defendant has a counter claim that may be set off against this judgment.

Mr. C. Comegys, for plaintiff.

Messrs. J. F. Reynolds and S. B. Price, for defendant.

Opinion by Newcomb, A. L. J.

January 6, 1908.

This controversy draws in question another judgment to No. 118 May Term, 1904, for $200, founded upon confession in defendant's promissory note of May 15, 1896, payable to his brother who is plaintiff in both judgments. This one is for $3,500 and is founded upon confession in defendant's bond of January 20, 1904, to secure payment of that sum on April 1, 1905, with interest from maturity at five per cent. Rule to open the first was granted March 1, 1907. The rule in this case was taken November 15, 1907, and both will be disposed of at this time.

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It is sought to have judgment opened to let in a plea of set off.

Prior to the date of the bond the parties owned as tenants in common the premises in the city of Carbondale known as the Hotel American. They had contributed unequal shares to the purchase money, and the erection, equipment and furnishing of the hotel. To No. 2 September Term, 1903, in equity, partition proceedings were brought in which the defendant here was plaintiff. The bill prayed also for an accounting as well to settle and equalize the investments of the parties as for mesne profits alleged to have been realized by the defendant, who is plaintiff here. Early in January, 1904, the cause came on for trial. Two days were consumed in taking the plaintiff's testimony. This included in minute detail the transactions of many years and covered everything directly, remotely or otherwise connected with the subject matter of the suit and the mutual accounts of the parties. At the suggestion of the court, who happened to be the writer, proceedings were then suspended in order that an effort could be made to settle their differences. In about two weeks a settlement was effected. S. H. Williams conveyed by quit-claim deed his interest in the property to his brother for $3,500, to secure which the bond was given, together with a mortgage as collateral. At the same time by instrument in writing for a nominal rental of one dollar John demised the hotel and contents, as designated by a certain inventory, to S. H. Williams for a term certain, to wit, from that date to April 1, 1905, at which time the premises were surrendered to John. The latter has no counter judgment to be set off but relies for relief on the terms of settlement.

While the papers vary somewhat in date as between the 20th and 26th of January, 1904, it seems safe to say they were all complete and mutually delivered on the 26th. Whether so or not it is said in the lease that they are "intended to constitute one contemporaneous transaction with a view to settling the matters late in dispute between" the parties.

We have no difficulty in holding "the matters late in dispute" were the matters covered and intended to be covered by the pleadings and the testimony so far as it had gone in the partition suit.

The defendant's right to relief in the premises is defined by the last clause of the lease wherein it is stipulated as follows:

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"And the said lessee hereby agrees further that any moneys or obligations assumed by him to be paid or liquidated hereunder shall and may be a credit or off-set to any sum or sums that may be at any time due said lessee from said lessor under the terms of a certain mortgage and the accompanying bond given this day (January 26, 1904) by said lessor to said lessee, in the sum of $3,500, or upon any other obligation that may be held by said lessee against said lessor, or upon any debt due from him to said lessee."

Clearly the claims that defendant may set off against either of the judgments in question are limited to those only which legally or equitably arise out of the plaintiff's obligations as specified in this contract. Reference to the antecedent clauses show that he stipulated as follows:

"That the said lessee shall and will deliver up and surrender said premises and personal property in good order, natural wear and tear only excepted upon the determination hereof, to wit, March 31, 1905, without further notice."

"That the said lessee shall and will pay the interest upon the mortgage debt unpaid or accruing up to April 1, 1905; that he will also pay all taxes unpaid and accruing up to that date, which shall include one-fourth of the taxes for the year 1905; all insurance premiums or fractions thereof unpaid and accruing, up to said date of April 1, 1905, as well as all electric light or power bills, all water and gas rates, and renew any and all personal property leased to him hereunder and named in a certain inventory made by William Shannon for both parties hereto at their joint request on January 20th and 21th, 1904, by substituting therefor property of equal value and in as good condition as that worn out, removed or destroyed as aforesaid, as well as also keep in repair the building, machinery and fixtures therein and renew any broken parts of machinery, appliances or fixtures at his own expense."

There is another clause by which the lessee assumed the payment of one-half of the judgment to No. 181 January Term, 1904, in this court and the like proportion of a claim of Mills Brothers in Carbondale. But we find no controversy on that score and it may be disregarded.

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It is thus apparent that there is something more here than the ordinary obligation to make fair and tenantable repairs. The plaintiff was bound to restore the property both real and personal. While the first clause might seem to restrict his obligation to extraordinary wear and tear, if read in connection with the further stipulation, as it must be, it is apparent that he was bound to repair the building, machinery, fixtures, etc., at all events, and also to restore personal property equal in value to that which he took under the lease.

It is equally plain that he was bound to pay the interest on the mortgage, the insurance and taxes specified. To the extent that he has failed in these undertakings the defendant has a counter claim that may be set off against these judgments.

He attempts to go farther and there has been much time spent in controversy over the dealings and accounts of the parties going back to 1893 or 1894. In that way defendant makes out an account of $3,425.39 against the plaintiff whereon he credits $548.75. Part of this credit is $200 for the note on which one of these judgments is founded. It is made up of:

1894, Paid license, ...	$500.00	
Balance, ...	3.91	
1896, October 12, Balance, ...		$ 503.91
1896, October 12, Cash paid Mary Fee, &c., . . .		125.00
1897, March 29, Cash loaned plaintiff.		500.00
etc., etc., aggregating on April 1, 1905, ...		4,539.39
One item, however, is waived, viz., Iona B. Smith case, ...		1,114.00
Balance, ...		$3.425.39

With the exception of three items they are manifestly no part of the property demised or of the insurance, taxes, interest or claims stipulated to be paid by plaintiffs. The three exceptions are as follows:

1904, January 26, Value of sta. eng., etc., ...	$ 622.34
April 1, Money received from sale of pump,	20.00
October 1, Six months water rent at barn, .	12.00

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It is suggested by the evidence that defendant may have a valid claim for reimbursement for the water rent. But it would appear to arise from an unauthorized diverson of the water supplied to the hotel and not to have accrued during the tenancy in question. For that reason it is not a subject of set off as against this judgment. As regards the other two items of property the evidence fails to show that either was on the premises at the date of the lease and therefore within the covenant to deliver or restore at the end of the term. In its entirety this group of claims is believed to lie outside the scope of set-off provided for. Therefore, whether any of the items are affected by the statute of limitations or are presumed to have been settled by the terms of the contract in suit, need not be considered.

But *prima facie* there is some merit in the other claims. In part they are made up of expense, incurred by defendant in repairs and replenishing the property real and personal since it came back into his possession, alleged to have been necessary by reason of plaintiff's default in those particulars. In part the claims consist of moneys paid on account of the interest, insurance and taxes included in plaintiff's covenant. They may be grouped as follows :—

FIRST.

E. F. Ryan, for repairs to roof and plumbing .	$298.35
Mathews Brothers, for 25 lbs. of glue for sizing,	4.50
Fred Mills, for sash for elevator window, . . .	1.00
Mills Bros., for glass and putty, ...	1.75
J. A. Hoole, for repairs on skylight, ...	9.99
Bunnell & Company, for repairs to furniture, .	40.10
A. E. Tiffany, for bed slate and closet seat, . .	3.20
Vonbeck Bros., for 275 lbs. of Muresco, . . .	17.88
Mills Bros., for shellac, ...	3.50
John Gibbs, for repairing plaster on walls, . .	30.55
Mills Bros., elevator lock, ...	.41
Fred. Burdick, for hauling soot from back of boiler, ...	3.00
Mills Bros., for glass for laundry door, . . .	.96
J. P. Cotter, for repairs to boiler, ...	12.20
Hendrick Mfg. Co., materials and repairs to	

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heater and range, ...	72.71
George Maldfeld, bills for plumbing, &c. . . .	40.00
Mills Bros., for glass for kitchen window, . . .	.40
George H. Ackerman, for painting and papering,	257.90
Total,	$798.40

SECOND.

Clark Bros., for sheeting, ...	$ 5.44
The Boston Store, for kitchen utensils, ...	4.48
The Syndicate Stores, for house furnishing goods, ...	49.67
G. W. Reynolds & Son, napkins, towels, linen, &c.	49.87
Geo. V. Millar & Co., for crockery and glassware,	85.16
Reese Bros., for sheeting, &c., about, ...	122.62
Total	$327.24

THIRD.

Interest on mortgage for $17,000 paid to Pennsylvania Trust Co., of Reading, Pa., $425; 5-6ths of same, ...		$354.16
Taxes for 1905, paid to P. Neary, $80.50, ¼th of same, ...		20.12
Insurance premiums, up to April 1, 1905,	11.40	
	5.75	
	5.39	22.54
Total		$396.82
Credit excess insurance premium for term overrunning the term of lease, paid by plaintiff,		57.46
Balance,		$339.36

In the aggregate these claims amounting to $1465 are believed if proven to the satisfaction of a jury, to be within the terms of the set-off as provided for by the contract. It is contended that the stipulation, being confined to "any moneys or obligations assumed by him to be paid or liquidated hereunder," etc., doesn't cover repairs or restoration of either the real or personal property. The principle

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of set-off is essentially an equitable doctrine. There was quite as much reason in equity why failure to repair and restore the property according to plaintiff's covenant should be drawn into the settlement of the bond as any other thing that he failed to do. The fact that the parties were at pains to sepcially provide for the repairs and restoration is not without some weight in interpreting the scope of the covenant for set-off. Construing the paper from its four corners we feel no hesitation in saying its intent was to include in the right of set-off every expense that should fall upon the lessor by reason of the lessee's default under his convenants. Whether in the extent of repairs and replenishing made by defendant he has exceeded the terms of the lessee's covenant is disputed. It is also disputed whether the interest, insurance and taxes have not been otherwise settled in whole or in part between the parties. But the nature of the dispute in these particulars is such that it ought to be determined by a jury. The aggregate of defendant's claim as we view it can thus be fully covered in this case. The other judgment, therefore need not be disturbed. To the amount of fourteen hundred and sixty-five dollars ($1465.00) the judgment is opened. To that extent an issue is awarded to try the matters in dispute in which the bond shall stand as plaintiff's declaration to which the plea shall be non-assumpsit, payment with leave, &c.

New matter in the reply, which the plaintiff is forced to plead in order to meet the allegations of the answer, is held, in Hunter Milling Co. v. Allen (Kan.) 8 L. R. A. (N. S.) 291, not to constitute departure if it does not contradict the facts stated in the petition, and is not adopted as a new basis for relief in place of the cause of action presented by the petition.

Failure to comply with a statute requiring public officers to advertise for bids for street work is held, in Dillingham v. Spartanburg (S. C.) 8 L. R. A. (N. S.) 412, not to invalidate a contract made without such advertising, unless the statute makes it a condition of the exercise of the power to contract.

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In the Court of Common Pleas of Lackawanna County, No. 420, November Term, 1907.

RULE TO STRIKE OFF JUDGMENT.

The Builders Exchange of Scranton vs. the American Surety Company of New York.

An affiant acted on his own responsibility without leave to intervene or any claim to speak in behalf of defendant.

Held: Being an unauthorized intrusion upon the record the affidavit was an nullity and the plaintiff was at liberty to ignore it.

Mr. Ralph W. Rymer, for plaintiff.

Mr. M. W. Lowry, for Surety Co.

Mr. T. P. Duffy, for F. J. Johnson.

Opinion by Newcomb, A. L. J.

January, 1908.

The defendant became surety on the bond of Mr. F. J. Johnson, who was a member of the plaintiff association. In form the obligation was joint and several. Its condition was that the principal should faithfully abide by and observe the orders and regulations by authority of a majority of the association's members in accordance with its constitution and by-laws.

It was further stipulated as a special condition on part of the surety "that upon due proof to the said surety that the said principal, after service upon it of a copy of any decision, order, prohibition or regulation and has been declared to be in default thereof by said board of governors, and has upon demand failed to pay to said obligees the amount of this undertaking, then within thirty days after receiving notice of said service and default the said surety to pay the full amount of this undertaking to said obligees as liquidated damages, which sum is herewith stipulated as liquidated damages and not as a penalty by the said principal, the said obligees and the said surety, and the surety and the principal herewith waive all defenses they may have against the payment of said sum."

While this clause is somewhat awkwardly drawn its meaning is plain enough. It emphasizes the several liabilities of the surety by prescribing the terms on which, as between it and the plaintiff,

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its liability should become fixed. It is upon such liability that the plaintiff declared, the suit being against the surety alone. The defendant took no defense and in default thereof judgment was entered against it November 14, 1907, at plaintiff's instance **sec reg.**

But on November 8th what purports to be his own affidavit of defense was filed by the principal obligor.

The question, therefore, is whether the presence of such affidavit operates to prevent judgment and thereby makes this judgment fatally irregular.

There is no question of non-joinder for it was optional with the plaintiff to sue severally, and the defendant alone could take advantage of any defect arising from want of proper parties. The affiant acted on his own responsibility without leave to intervene or any claim to speak in behalf of defendant. He only asserts the right to interpose his affidavit as in response to notice from defendant "to appear and make defense if any I have to the claim of said plaintiff." Thus it is apparent that the plaintiff's right is not questioned by the defendant, and the affiant was not requested to make any defense in its behalf. The case presents nothing more than a voluntary attempt of the affiant to make himself a party to litigation between others by his own act or statement on the record. This he cannot do.

Phila. vs. Jenkins, 162 Pa., 451.
Smith, et al. vs. Levy, 6 Pa. Sup. Ct., 23.
Fees vs. Shadd, 20 Ib., 193.

Being an unauthorized intrusion upon the record the affidavit was a nullity in law and the plantiff was at liberty to ignore it. It follows that the judgment was not on that account irregular and that is decisive against the motion.

The rule to show cause is discharged.

The right of one from whom property has been taken in replevin to maintain a similar action for its recovery is denied in Kierbow vs. Young (S. D.) 8 L.R.A. (N.S) 216. The other authorities on this question are collated in a note to this case.

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In the Court of Common Pleas of Lackawanna County, No. 626, May Term, 1905.

RULE FOR A NEW TRIAL.

The Hunt & Connell Co. vs. W. H. Clark, et. al.

The general rule is that notice to an agent in order to effect the principal must have reference to business in which the agent is engaged by authority of his principal and within the scope of his agency.

Messrs. Welles & Torrey, for plaintiff.

Messrs. Willard, Warren & Knapp, for defendants.

Opinion by Kelly, A. L. J.

December, 1907.

On the 13th of February, 1903, the plaintiff and defendants owned adjoining properties in Dix court in the City of Scranton. On that day there was a fire in the building of the defendants which destroyed the roof, destroyed some of the girders and weakened others, and affected the floors, but left the brick walls practically standing to their full height of three stories. On the 28th of February, 1903, there was a severe rain and wind storm and one of the walls of the defendants' building fell upon and seriously damaged the smaller building of the plaintiff. This suit was brought to recover damages thus sustained, upon the allegation that the fall of the wall was due to the defendants' negligence in not using due care to prevent the happening of such an accident. The verdict was for the defendants and the plaintiff asks for a new trial because of certain alleged errors in our rulings and charge to the jury.

The building of the defendants' before the fire was occupied as a carriage factory by a tenant and the rents were collected by T. F. Wells, esq., an attorney at law, who also collected rents from other properties of the defendants in this city. He paid taxes from the rents so collected after first submitting statements of them to the owners, and he also caused repairs to be made at time but only upon their orders. He had no written contract nor any express verbal agreement as to the extent of his agency, and the scope and extent of his authority could only be inferred upon from the evidence of what he did and the dealings between him and them. After the

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fire the building inspector of the city served a written notice upon him to the effect that the walls were unsafe and that certain steps should be taken to insure their safety, etc. Mr. Welles did not read the notice but handed it over to a contractor to whom the defendants had given a contract to rebuild. There was no evidence in the case to the effect that the defendants had any knowledge of the contents of the notice or that they had any notice from any one that the walls were dangerous.

The planitiff contended at the trial that the notice served upon Mr. Wells had the legal effect of notice upon the defendants so as to charge them with knowledge that the walls were dangerous, and offered the notice for the purpose of affecting them with such knowledge. We rejected it as incompetent. We also struck out certain testimony as to the service of the notice upon Mr. Wells, and we sustained objections to certain questions asked Mr. Wells by plaintiff's counsel, viz., whether notices of tax assessments upon the property had been served upon him, whether all notices relating to the property had not been served upon him, who had negotiated for the insurance, and whether he had not employed the contractor after the fire as agent for the owners. The reasons for a new trial urged at the argument of the rule were those relating to these rulings.

As to the last question rejected (p. 64, notes of testimony) it was objectionable in form, and as to the others we are still of the opinion that they were properly rejected as immaterial, and that if they had been allowed and answered to the effect that all notices respecting the property had been served upon Mr. Wells and he had ngotiated for the insurance, it would not have benefited the plaintiff. Such evidence of agency, with that in the case, would not warrant a finding by the jury that Mr. Wells was such an agent that a notice to him would charge the owners with notice. The general rule is that notice to an agent in order to affect the principal must have reference to business in which the agent is engaged by authority of his principal and within the scope of his agency. In this case the agent was employed to collect rents, and to pay taxes and look after repairs and insurance we will concede for the sake of the argument, but when the building burned he notified the

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owners and they came on and took charge of it themselves. He had no duties to perform with reference to rebuilding or taking care of the ruins, and we would not have been justified in allowing the jury to infer that he had under the evidence admitted or offered. We are not dealing with the question of apparent authority, but with one of actual authority. So we do not think we erred in the rulings complained of.

The other reasons are not urged and require no discussion. The rule for a new trial is discharged.

In the Court of Common Pleas of Lackawanna County, No. 425, May Term, 1900.

RULE FOR A NEW TRIAL AND RULE FOR JUDGMENT NON OBSTANTE, ETC.

Orlando Rozelle vs. B. S. Lewis and Wife.

Defendant Seriously Controverted Certain Declarations of Plaintiff's Grantor, now deceased and touching the boundary in dispute, and upon which Plaintiff's case depends.

Held: That the verdict in favor of the plaintiff must settle the question because it was ample to warrant the conclusions arrived at. That there was no evidence of fraud on the part of the plaintiff or lack of knowledge on the part of the defendant and that all the plaintiff did was consistent with the claim made. The rule for a new trial was discharged, the motion for judgment non-obstante, denied and judgment ordered entered for plaintiff.

Geo. D. Taylor, Esq., for Plaintiff.

R. A. Zimmerman, Esq., for Defendant.

Opinion by Newcomb, A. L. J.

August, 1907.

This action was ejectment. May 17, 1902, there was a verdict for plaintiff subject to a point reserved by former Judge Wheaton of the Eleventh district, specially presiding at the trial. Reasons were regularly filed and a rule for new trial allowed May 29, 1902. No motion for judgment was ever filed. But among the files is found such motion with an order of the trial judge endorsed thereon: "Let the within motion be marked filed as of this date, May 29, 1902." In the meantime, although not until nearly five years

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after the trial, Judge Wheaton retired from office. The charge of the court has never been filed. No explanation of this delay and inattention of counsel is offered.

Under these circumstances both the rule and motion for judgment may be treated as abandoned, and they should accordingly be discharged for want of due prosecution.

On the merits, however, it is believed that the case was for the jury and the verdict should not be disturbed.

The only thing seriously controverted by defendant is the admission of certain declarations of plaintiff's grantor, now deceased, touching the boundary in dispute, and upon which plaintiff's case depends.

The suit involves the location of a town lot on a plot of lands in the Borough of Dunmore known as "Meylert's Addition to Scranton and Green Ridge." Louise Gilmore was formerly the owner of block 318 as described in the plot which was of record. This block comprised twenty lots of which the first ten front westerly on Adams avenue. With the exception of numbers 1 and 10, being corner lots, they are plotted of a uniform width of forty feet. They would appear to have been conveyed to Catherine Schadt in her lifetime. For in 1890, some years after her death, Mrs. Gilmore conveyed them to Charles Tropp of this city and Frederick Scheidell, of Sullivan County, N. Y., executors of Mrs. Schadt, by deed reciting a former conveyance to the deceased which this was intended to confirm. This deed was duly recorded.

Mrs. Schadt's death occurred in July, 1886. By her will, probated in September following, she devised her estate real and personal to her executors in trust to carry out its specific provisions, except so far as they might discharge the bequests out of rents and profits. She further gave the executors power as follows: "In order that this, my last will, may be fully carried out, I hereby authorize and empower my said executors to sell or convey all or any part of my estate and convert the same into money to be by them securely invested as they may see fit and to that end they are hereby authorized and empowered to make good and sufficient deeds and conveyances of any and all of my said property and invest and dispose of the proceeds as above directed."

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The legal title being thus in the executors, in 1893 they conveyed lot 7, as described in and by the recorded plot, to Rozelle, the plaintiff, by article of agreement. The article was never recorded but the vendee took immediate possession in accordanc with its terms and improved it with a dwelling house where he has resided ever since. The contarctor who built the house was Mr. Lewis, one of the defendants. There was evidence uncontradicted that at that time the corners of the lot upon which the house was built were marked by stakes on the ground, that Mr. Lewis in company with the plaintiff measured between the two on the avenue and found them to enclose forty feet; that in locating the foundation of the house they designed it so as to be twelve feet from lot No. 8 on the northerly side and six feet from lot No. 8 on the other side, and took measurements for that purpose. The house was 22 feet wide.

In 1896 Scheidell, surviving executor of Mrs. Schadt, sold lot 8 by articles to B. S. Lewis, Jr., and T. G. Lewis, defendant's sons. There was evidence, though contradicted, that in making their improvements these vendees recognized plaintiff's possession as he claimed it; that in laying a sidewalk on the avenue in front, they conformed to his corner, and in laying a flag walk from front to rear on the southerly side of their lot, the line as he has at all times claimed it to be was discussed between him and them and that accordingly they laid their walk twelve feet from the house in order to conform to the line. There were no fences, but there was evidence that from 1897 until the controversy began in 1899 the strip of land to the south of the flag walk, now in controversy, was used by plaintiff for clothes line posts, one of which stood very close to the walk.

From the time the vendees of lots 8 finished their house in 1897 they together with their parents, the defendants here, have lived on the lot. In 1898 their contract was assigned to Mrs. Lewis, the substantial defendant, by her sons. In September the same year, title was conveyed to her by the surviving executor. She saw the walk and the clothes line post but never made inquiry of plaintiff as to where he claimed the corners or boundary to be. There is

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no evidence that any one other than plaintiff ever used, occupied or claimed any part of the forty feet south of the flag walk until sometime in the Fall of 1899. At that time without consulting plaintiff and in his absence Mr. Lewis erected what he called a line fence three and 6-10 feet south of the flag walk, and reduced plaintiff's possession to 36 4-10 feet. That brought on the suit.

Defendants reply upon what they claim under the advice of surveyors is the correct location of the lot line according to the plot. While not conceding that his location varies from the plot plaintiff relies especially upon the acts and declarations of Tropp in designating the corners of lot 7 on the date of his contract as required by him before he would execute it. It was the admission of this evidence that is the matter chiefly in controversy now.

So far as objection went to the competency of the plaintiff so testify to the declarations of the deceased grantor acting as a trustee and executor with power to sell, we fail to see how the rule excluding the testimony of a surviving party, etc., applies, and that was not seriously urged at the argument. Granting that the witness was competent, then so far as concerns the competency of the evidence it is believed to be subject to the rules governing declarations as to boundaries by a former owner, or his agent with power to sell. If so the estate of Mrs. Schadt would be bound by the declaration in question. The evidence was clear that at the request of plaintiff before the contract was accepted Mr. Tropp met him on the ground by appointment and there designated the lot described in the contract by corner stakes which he said had been placed by his surveyor. Upon the faith of that plaintiff signed the contract and the executors stood by and saw him locate and build his house accordingly. This, if found to be the fact, so far as Tropp or his survivor in the trust is concerned,, would bind the estate regardless of the true corner under the doctrine of Willis vs. Swarts, 25 Pa., 413.

The principle upon which the decision rests is estoppel. It would, therefore, seem that the only other question would be whether the evidence was sufficient to affect Mrs. Lewis with notice of the facts which give rise to the estoppel. In effect as between

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vendor and vendee in such case the estoppel would amount to a defect of title in the vendor **pro tanto** to the extent of the discrepancy. When Mrs. Lewis afterwards took title to that, with notice, she took it subject to its infirmity.

Under adequate instructions of the learned trial Judge the facts regarding the designation of his corners by the executor were found in plaintiff's favor. It was further left to the jury "to determine under the evidence whether plaintiff's possession was of such character that made it the duty of Mrs. Lewis or her assignors to inquire of the plaintiff the character of his title and the extent of his claim;" and if his "possession was of such character as to put the duty of inquiry as to its extent upon the defendants then defendants would be bound by such facts as may reasonably be concluded would have been made known as a result of such inquiry."

The verdict must be taken to have settled this question of fact in plaintiff's favor.. The evidence to be considered by the jury for and against the plaintiff's contention was impartially discussed in a preceding part of the charge. We cannot say that it was insufficient to warrant the conclusion that defendants had actual notice of the extent of plaintiff's claim and constructive notice of its character, especially in the absence of any evidence that Mrs. Lewis had any knowledge of his contract. There was no evidence of anything said or done by him that would tend to mislead her in the premises. All that he said and did was consistent with the claim he now asserts. Neither she nor her assigners claim to have asserted any other or different line than such as was defined by the flag walk prior to 1899 when for some reason she had a survey made.

The reservation as found in the charge which we have had transcribed was as follows: "I reserve the question whether there is any evidence in the case to be submitted to the jury upon which the plaintiff is entitled to recover." This was to cover defendants request for binding instructions.

For the reasons stated the point reserved is decided against the defendants, the rule for new trial is discharged, the motion for judgment **non obstante** denied and thereupon judgment is directed to be entered on the verdict for plaintiff **sec reg.**

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In the Court of Quarter Sessions of Lackawanna County No. 170, December Sessions, 1907.

MOTION FOR RE-HEARING.

Commonwealth vs. Jacob Yerka.

The object of the Act of 13th April, 1867, P. L. 78, was to afford a means of enforcing the performance of the husband's duty to support his wife to such extent as is necessary to keep her from becoming a public charge.

The court has jurisdiction under the Act to order a further sum to be paid if necessary to prevent the wife from becoming such a charge, even when the parties had separated by agreement which stipulated for the payment of a certain sum per month to the wife.

Mr. J. J. O'Malley, for Commonwealth.

Mr. H. D. Carey, for Defendant.

Opinion by Newcomb, A. L. J.

January 28, 1908.

December 7, 1907, an order was made directing the defendant to pay to his wife the sum of $10 per month and to give security according to law. The proceedings were for non-support under the Act of 13th April, 1867, P. L. 78.

The fact appeared at the trial that the wife had withdrawn from her husband's house and was living with some relative in the same village. It was not disputed that the parties had lived very discordantly to say the least. Defendant, however, claimed it was his wife's fault and it is now complained that we erred in not deciding the merits of that controversy and in declining to hear certain witnesses in corroboration of the husband's version of the trouble.

There was no dispute that the wife is without means, dependent upon her friends for support and liable to become a charge upon the public.

The wife having left the husband's house the learned counsel takes the position that it was incumbent on the Court to determine whether she left under circumstances entitling her to a divorce; that it was the privilege of the husband to show that she did not, and that relief is to be granted or refused according as that question of fact should be found. He cites several Quarter Sessions cases

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that lend some color to his contention. While the decisions are not entirely harmonious it is believed that upon close analysis the conflict is more apparent than real. We are not. therefore, convinced that it was erroneous in this instance to decline to assume the jurisdiction of a divorce court. The object of the statute was to afford a means of enforcing the performance of the husband's duty to support his wife to such extent as is necessary to keep her from becoming a public charge. Heilbron vs. Heilbron, 158 Pa., 297.

So where the parties had separated by agreement which stipulated for the payment by the husband of a certain sum per month to the wife the Court still has jurisdiction under the Act to order a further sum to be paid if necessary to prevent the wife from becoming such a charge. Commonwealth vs. Orth, 2 Pears, 446. This is a well considered case and so far as we are aware the correctness of the decision has never been questioned. Manifestly it could not be supported by that part of the Act dealing with a husband who "shall separate himself from his wife without reasonable cause." It was distinctly put upon the other provision, viz: "or shall neglect to maintain his wife." The better opinion would, therefore, seem to be that where the wife has left her husband and her necessities are such that she requires relief the Court is not called upon to inquire into the cause of separation.

It may be that if it were apparent that in leaving her husband the wife acted capriciously, without excuse, or in bad faith, a different question would be presented here. But it is a case of mutual crimination and recrimination. Thus a substantial issue on the merits of that dispute is sought to be raised for adjudication. We think that is for the divorce courts and cannot assent to the proposition that the Quarter Sessions is to sit in judgment thereon and that relief depends upon its determination. The motion for rehearing is refused.

The power of the legislature to bar the right of the owner of unoccupied land to question the validity of a tax sale, although there has been no adverse possession on the part of the tax purchaser, is sustained in Nind vs. Myers (N. D.) 8 L.R.A. (N.S.) 157.

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In the Orphans' Court of Lackawanna County. No.

SUR EXCEPTIONS TO ACCOUNT OF TRUSTEE.

In Re: The Estate of Joseph C. Platt, Deceased.

When the stock of a bank is bequeathed in trust for the use of a beneficiary for life with remainder over, the surplus fund accumulated during the testator's life, but not divided until after his death, belongs to the corpus of his estate, while that which accumulated after his death, is income and payable to the life-tenant.

The right to subscribe for new shares upon an increase of the capital stock, which is an incident of the ownership of the stock, does not belong, as a privilege, to the life-tenant, but such increase must be treated as capital, and be added to the trust fund for the benefit of the remainder-man. This is the rule whether the trustee subscribes for the new stock for the benefit of the trust or sells the right to subscribe for a valuable consideration; in either event the increase goes to the corpus.

Messrs. Wells & Torrey, for Exceptant.

Mr. T. F. Wells, for Accountant.

Opinion by Sando, P. J.

January 20, 1908.

The testator died November 15, 1887. His last will and testament dated December 13th, 1881, duly probated, provided inter alia:

"Fourth—All the rest, residue and remainder of my estate, real personal and mixed, I direct shall be divided into three equal shares: One of the said shares I give, devise and bequeath to my son, Joseph C. Platt, Jr., his heirs, executors, administrators or assigns forever. Another of said shares I give, devise and bequeath to my son, Frank E. Platt, his heirs, executors, administartors or assigns forever. The other one of the said shares I give, devise and bequeath unto my two sons, Joseph C. Platt, Jr., and Frank E. Platt, and the survivor of them in trust nevertheless to pay over therefrom to my said daughter, Ella J. Platt, the sum of Ten Thousand Dollars, and also to pay over to her, my said daughter Ella, the interest and income from the remainder of the said share during her natural life. And I authorize and empower the said Trustee or the survivor of them, to invest the said share in such securities as to them, or the survivor of them, shall seem best."

The accountant is the surviving trustee, under the will of the testator, for Ella J. Platt, and a part of the trust estate coming into his possession were thirty-four shares of the capital stock of the

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First National Bank of Scranton. The regular dividends thereon have been paid to the beneficiary in the trust, by the trustee as they have been received by him, including those for the year 1905.

The stockholders of the First National Bank at a meeting held on October 10th, 1905, voted to increase the capital stock from $200,000, to $1,000,000, and every stockholder was given the right to subscribe for his or her proportion of such increase at the par value of $100 per share. The stockholders were not obliged to take the allotment of the increase of stock. The right to subscribe was given only to the stockholders of record and all the increase of stock was taken by the stockholders.

The trustee under the right to subscribe, purchased one hundred and thirty-six shares of such increase, paying for the same $13,600.00 out of the trust fund in his hands and holds the same as part of the trust.

The bank called in all of the old certificates for stock of the bank as represented by the capital of $200,000.00 and issued new certificates in place thereof and for the increase of $800,000.

The Board of Directors of the bank on October 14th, 1905, declared a special dividend of four hundred per cent.; which dividend was paid entirely from the surplus and undivided profits; and the trustee received $13,600.00, as the share of the special dividend upon the thirty-four shares held by him as trustee.

At the time of the death of the testator, the surplus funds of the bank amounted to $465,060.29, and at the time of declaring the special dividend it amounted to $2,080,792.75, from which the special dividend was paid.

The trustee apportioned the dividend so received so that the principal of the trust in his hands received $3,039.60, being the proportion of the dividend earned prior to the death of the testator, and Ella J. Platt, $10,560.40, being the proportion of the dividend earned subsequent to the death of the testator.

The trustee in the account filed has charged himself with the $10,560.40. To this item the exceptant objects, contending that the trustee should not have charged himself with the amount of the cash dividend received, but that he "should have charged himself

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with the shares of stock which should go to the cestui que trust."

In disposing of the exception filed, two questions are presented for our consideration: (1) Was the division of the special dividend of $13,600.00 made in accordance with law? (2) Does the increased stock coming to the trustee, on account of the thirty-four original shares held by him, belong to the corpus or principal of the estate, or to the life tenant, as income?

There was no dividend declared payable in stock; and the special dividend declared was in cash and regularly paid, and the proportion thereof, earned after the death of the testator, on the stock held in trust, is $10,560.40.

The trustee has charged himself with $10,560.40 of the special dividend and in his account now before the court, that amount is the proportion of such dividend actually accruing on the thirty-four shares held in trust, and distributed to the cestuique trust.

The dividend of four hundred per cent. declared by the bank on October 14, 1905, being a special and unusual one and not the ordinary periodical one, its distribution i nthis case, is governed by the rule that so much thereof asw as paid from the surplus accumulated prior to the death of the testator belongs to the principal of the trust, and so much as was paid from the surplus accumulated after his death belongs to the life tenant.

The distinction between the surplus fund existing at the time of the death of the testator, and a fund accumulated afterwards, is distinctly recognized in Earp's Appeal 28 Pa., 368. That which had accumulated before the death of the testator, was held to be part of the principal of the fund, and that which accumulated after his death to be income. The correctness of this principal is expressly affirmed in the following cases: Biddle's Appeal, 99 Pa., 282; Connolly's Estate (No. 1) 198 Pa., 137.

In Smith's Estate, 140 Pa., 352, Mr. Justice Clark uses the following language: "It will be seen that the ruling in Earp's Appeal has, for more than the third of a century, been steadily maintained, without modifications or change; in no subsequent case, we believe has its authority been doubted, its practicability questioneod, or the soundness of its doctrine impeached."

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The stock increase was voted and approved by the stockholders and was a completed action on October 10th, 1905, four days before the special dividend was declared. The purchase of the increase stock was made by the accountant with funds of the trust.

It is contended that the right to the one hundred and thirty-six shares, alloted the thirty-four shares, vested entirely in the trustee and belongs to the principal of the estate, and that even if he had not seen fit to invest trust funds in the purchase of the stock increase, but had sold the right to take the stock, the proceeds of such sale would not have been income, but would have belonged to the principal of the estate.

This contention is fully warranted under the authority of Eisner's Estate, 175 Pa., 143 and the cases therein cited. In Cook on Stock and Stockholders, section 559 the rule is stated: "The right to subscribe for new shares at par upon increase of the capital stock, which is an incident of the ownership of the stock, does not belong as a privilege to the life tenant, but such an increment must be treated as capital, and be added to the trust fund for the benefit of the remainder—man. This is equally the rule whether the trustee subscribes for the new stock for the benefit of the trust or sells the right to subscribe for a valuable consideration. In either event the increase goes to the corpus. The subsequent income, however, of such increase belongs during the continuance of the life tenancy, to the life tenant as income; the new shares are part of the corpus, and the life tenant, being entitled to the income from the corpus, takes th income from the accretions thereto." The same principles was sustained in Biddle's Appeal 99 Pa., 282, and in Moss' Appeal 83 Pa., 264.

A person having a life estate in the stock of a corporation is not entitled to the enhanced value of the stock due to undivided profits. Such enhanced value belongs to the remainder-man. Connolly's Estate (No. 1) 198 Pa., 137.

The capital stock of the First National Bank was regularly increased by the stockholders on October 10th, 1905, four days before declaring the special cash dividend of four hundred per cent. By reason of such increase, the trustee was entitled to subscribe for one

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hundred and thirty-six shares upon the holding of the original thirty-four shares; he purchased the additional shares from funds of the principal of the trust in his hands and holds them as part of the principal. The income or dividends hereofter declared thereon belong to the cestui que trust.

The issue of the new stock tended to lower the value of the existing stock, and therefore to impair the capital, and the award of the new stock operated by way of compensation for the loss. In Eisen's Estate, it was held that the stockholders of a corporation are the owners of its property, and are therefore entitled to all increments to the original value of the stock; and the right to subscribe for new shares at par, upon an increase of the capital stock, is an incident of ownership, and the additional shares must be treated as capital. It follows from this that the issue of new stock was in no sense a dividend, which may be defined to be an alloted share of the earnings and profits of a corporation, and is therefore not covered by the testamentary gift of "interest and income from the remainder of the said share": Paxson's Estate, 16 D. R. 565.

A cash dividend is income, and the right to subscribe for a new issue of stock is principal. The former belongs to the life-tenant, the latter to the remainder-man: Moore's Estate, 12 D. R. 183.

Now, January 20th, 1908, the exception is dismissed, and the account confirmly finally.

An ordinance forbidding merchants to give out trading stamps in their business is held, in Denver vs. Frueauff (Colo) 7 L.R.A. (N.S.) 1131, not to be authorized by constitutional and statutory provisions making lotteries and gift enterprises unlawful.

That a stipulation in a bill of lading that a claim for damages for injury to freight must be presented within ten days after the freight is removed from the car cannot be said, as matter of law, to be reasonable when applied to live stock, the character of the injury to which cannot be determined within ten days, is held, in Wabash R. Co. vs. Thomas (Ill.) 7 L.R.A. (N.S.) 1041.

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In the Court of Common Pleas of Lackawanna County, No. 534, November Term, 1907.

MOTION TO QUASH ALTERNATIVE WRIT OF MANDAMUS.

Jacob Lotz vs. John J. Durkin, Morgan Thomas and Victor Burshell, as Commissioners of Lackawanna County.

The County Commissioners are the fiscal agents of the County and the trend of legislation is to charge them with the responsibility of disbursing all County moneys and of making contracts which impose a liability upon the County, subject to the concurrence of the Controller as provided by the Controller's Act of 1895. Under the Act of 1891 all orders for the payment of the work and books necessary for new indices are to be drawn on the Treasurer by the County Commissioners, although the purchase of the books and the supervision of the work are left to the officers immediately concerned, that is, to the Prothonotary, Clerks of the Court, Register of Wills and Recorder of Deeds.

Mr. George D. Taylor, for Plaintiff.

Mr. John J. Toohey, County Socilitor, for Defendants.

Opinion by Edwards, P. J.

February 10, 1908.

Instead of making a return to the alternative writ of mandamus issued in this case, defendants moved to quash the writ. As the parties desire a final judgment, it would have been better for the defendants to have made a return to the writ so as to enable the plaintiff to demur thereto, the matter involved being only the one legal question which was argued before us and which is made the foundation of the motion to quash.

The question of law raised by the defendants bring before us the act of May 26, 1891, P. L. 129, authorizing the Court of Common Pleas of the several counties of the Commonwealth to make certain orders relating to indices in the offices of record in said counties.

Holding as we do, on the authority of several cases, that the duty imposed upon the Common Pleas by this Act of 1891 has not been taken away by the tenth section of the Act of 1895, P. L. 403,—the Controllers' Act, nor by any other legislation, there is nothing left to consider but the provisions of the Act of 1891 itself.

The first section empowers the Court, whenever it shall appear advisable on inspection of the books of records and indices belong-

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ing to the "several offices" of Prothonotary, Clerks of the Court, Register of Wills and Recorder of Deeds, to make the necessary orders to change the mode of preparing and keeping the indices "in one or more of said offices."

The second section authorizes the Court to direct new indices to be prepared "in any one or more of said offices."

The third section which touches the question in the case at bar is given here in full:

"The books required for said indices provided for by the first and second sections of this Act, shall be purchased by the **proper officer** and paid for out of the County funds by orders drawn on the treasurer of said County by the **proper officers thereof.**"

The contention of the defendants is that the "proper officers" first mentioned in the third section is meant for the County Commissioners. Of course, this contention cannot be maintained for a moment when judged by the simplest rules of grammar. We may say here that the third and fourth sections are very crudely drawn. If the words "county commissioners" were used wherever such officers were intended to be referred to, there would be no question raised as to the identity of the other "proper officer," meaning the Prothonotary, Clerk of the Court, Register of Wills or Recorder of Deeds, as the case might be. The third section states that the books shall be purchased by the "proper officer"—that is, by the Prothonotary, or the Recorder of Deeds or the officer whose office is the subject of the court's order. The books shall be paid for out of the County funds by orders drawn on the Treasurer of said County "by the proper officers thereof"—the County Commissioners, they being the "proper officers" to draw orders on the County Treasurer. The use of this singular and plural in "officer" and "officers" in the third section would be quite persuasive were it not that this is lost sight of in the fourth section, where it is stated that the orders to be drawn on the Treasurer of the County shall be drawn by "the proper officer thereof," meaning undoubtedly the County Commissioners, although the singular number is used. Notwithstanding the questionable grammar of the third and fourth sections, there is no difficulty in ascertaining the legislative intent

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or meaning. The same question, **inter alia,** was before the Court of Perry County in an Index case, 11 District Rep., 567. An order was made as to a certain index in the Prothonotary's office. The Prothonotary, under the provision of section four of the Act of 1891, appointed a certain person to do the work; the County Commissioners appointed another one. Each of the parties relied upon the wording of section four. The court in construing this section decided that the term "proper officers" in the first line of the section referred to the officers holding the county offices, the Prothonotary, etc. The case was dismissed on other grounds.

We are aware that the County Commissioners are the fiscal agents of the County and that the trend of legislation is to charge them with the responsibility of disbursing all County moneys and of making contracts which impose a liability upon the County, subject to the concurrence of the Controller as provided by the Controllers' Act of 1895; but the legislature, by the Act of 1891, has not interfered seriously with the general scheme of legislation relating to the fiscal affairs of counties. By this Act all orders for payment of the work and books necessary for new indices are to be drawn on the Treasurer by the County Commissioners, although the purchase of the books and the supervision of the work are left to the officers immediately concerned, that is to the Prothonotary, etc., as the case might be. It may be argued as a proposition liable to move legislative discretion that the officer in charge of a county office knows better than anybody else the kind and value of the books necessary for indices in his office. The legislature, certainly, had the right to place the responsibility of the work and of the purchase of the books on the head of each County office concerned rather than on the County Commissioners. As was said by Black, C. J., in Brown vs. County Commissioners, 21 Pa., 39: "There is nothing in the Constitution which makes a County Commissioner sacred and intangible by the legislature. The office is created by legislative authority, and all its power and privileges are derived from that source. They who made, can unmake it wholly, and a fortiori can limit and restrict its incidental rights."

We shall not discuss this matter any further. The rule to show cause why the alternative writ of mandamus should not be quashed is discharged, and the defendants are allowed three days to make return to said writ.

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In the Court of Common Pleas of Lackawanna County, No. 1; March Term, 1907.

IN EQUITY.

Exceptions to Decree Nisi.

Scranton Gas & Water Co. vs. Delaware, Lackawanna and Western Railroad Company.

Where a company purchases land for its corporate uses as by condemnation proceedings it should appear that corporate action was taken authorizing the purchase or indicating what it was for.

The mere fact that the title is taken by deed to the corporation without any antecedent or subsequent corporate action tending to devote it to public use does not constitute dedication to a public use.

The power of eminent domain having been conferred upon a corporation for a specific purpose, a discretion to determine whether its exercise for that purpose is necessary being vested in a board of managers, some affirmative action by such board finding the existence of the necessity for the particular purpose is requisite to the legal exercise of the power.

Messrs. J. H. Torrey and M. J. Martin, for Plaintiff.

Messrs. Willard, Warren & Knapp, for Defendant.

Opinion by Newcomb, A. L. J.

March 2, 1908.

These exceptions have been pending since June 22, 1907, but were not moved for argument until late in December. Their number and character have made necessary an entire review of a rather voluminous record. No material error is found in the conclusions of fact, and we are not convinced that the conclusions of law were unwarranted.

The first exception complains that we erred in the eighth conclusion of fact in that we duplicated one of the reservoirs in question under different names, to wit: "Meadow Brook" and "Williams Bridge." The plaintiff is in no position to except for the reason that the finding was in accordance with its thirteenth request. They were there specified as two different reservoirs. This was due to the fact that in the evidence they were mentioned by both names without showing that they referred to the same thing. But inasmuch as that is agreed to be the fact the schedule of reservoirs as stated in the eighth finding is corrected accordingly. This reduces the total storage capacity there stated from 5,405 to 5,005 million gallons.

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In the twenty-third finding the president of plaintiff company is referred to as the owner of 90% of its capital stock. This doesn't appear by the transcript of the evidence. Hence, it is apparently erroneous. It is quite immaterial, and is so conceded by counsel. But having been excepted to the finding is corrected in that particular.

It is further complained that the plaintiff's several requests were not categorically answered. Its requests for findings of fact numbered sixty-four and covered 27 pages of typewriting. Some were specifically answered. As to the others it was believed they were so obviously covered by the general findings that further answer would be unnecessary repetition. So far as not specifically answered perhaps reference ought to have been made to the general finding covering the subject matter of each request, and that will now be added as follows:

1. That the Scranton Gas and Water Company was incorporated by special act of assembly passed March 16, 1854, found in pamphlet laws of 1856, page 599, "with power to provide, erect and maintain all works, machinery, fixtures or engines necessary or proper for making, raising and introducing into the village of Scranton, Luzerne County, a sufficient supply of gas and pure water; and for that purpose may provide erect and maintain all proper buildings, cisterns and reservoirs for the reception of the gas and water to be introduced, and for this purpose they are authorized and empowered, by themselves, their agents, engineers and workmen, to take water from any stream and with their tools, carts, wagons and horses to enter upon lands and enclosures, streets, lanes and alleys, roads, highways and bridges, as may be necessary to occupy or to obtain necessary materials for the construction of the said works, and to occupy, ditch and lay pipes, and from time to time to repair the same; and if any injury be done to private property the said company shall make compensation therefor in the manner hereafter provided."

Answer: This is so found in the first conclusion of fact.

2. By further supplement to the act aforesaid, passed on the 2*th of April, 1854, found in pamphlet laws of 1854, page 500, it was provided that "whenever the parties cannot agree upon the

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damages claimed for land or materials taken by the Scranton Gas & Water Company in the prosecution of their work, the said company may tender a bond and proceed in all respects as provided in the second section of the act entitled "a supplement to the act incorporating the Pennsylvania Coal Company,' approved 7th March, 1849."

Answer: It is so found in the second conclusion.

3. That the act incorporating the Pensylvania Coal Company, passed 7th March, 1849, found in P. L. 1849, page 135, provides for the appointment of viewers to assess damages in all cases where the said company cannot agree with the owners.

Answer: It is so found in the second conclusion.

4. That by a further supplement to the act incorporating the Scranton Gas and Water Company, passed 21st March ,1861, found in P. L. 296, the powers of the company were so extended as to include the whole or any part of the township of Providence, the borough of Providnece, the borough of Hyde Park, in addition to the borough of Scranton, and by special act of assembly incorporating the City of Scranton, in 1866, all of the above-named boroughs were included within the territory of the City of Scranton.

Answer: It is so found in the third conclusion.

5. That on the 3rd of May, 1900, the Scranton Gas and Water Company accepted the provisions relating to similar corporations of the general corporation act of 1874, and the constitution of 1873, and upon filing such acceptance in the Secretary of the Commonwealth's office letters patent were accordingly issued to the company on the same date.

Answer: It is so found in the fifth conclusion.

6. That shortly after the incorporation of the company the Scranton Gas and Water Company began the business of supplying water to the territory named in its charter and has continued to supply the same up to the present time.

Answer: It is so found in the fifth conclusion.

7. The territory supplied by the Scranton Gas and Water Company has been steadily increasing in population since 1854 up to the present time, and at the last census in 1900, the population of the City of Scranton was something over 102,000.

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Answer: It is so found in the fifth conclusion.

8. The principal supply of water for the City of Scranton is derived from what is known as Roaring Brook and its tributaries, a stream running down the westerly slopes of the Pocono mountain and emptying into the Lackawanna river in the City of Scranton. The waters of this stream have been supplied to the City of Scranton by the Scranton Gas and Water Company for the period of forty years or more.

Answer. It is so found in the sixth conclusion.

9. That W. W. Scranton became president of the Scranton Gas and Water Company in 1879; and at the time when he became president of the company, the source of water supply of the City of Scranton was the reservoir on the Roaring Brook known as No. 7 dam, with a capacity of about sixty million gallons; in 1879 the approximate consumption of water was about five million gallons per day, and that was what the system was planned to supply at that time.

Answer: This is so found in the seventh conclusion, except as to the date when Mr. Scranton became president, which, being undisputed, is also found to be a fact.

10. From 1879 up to the present time the consumption of water in the City of Scranton has been increasing steadily from five million gallons per day up to thirty-two million gallons per day, which is the quantity of water now being consumed in the City of Scranton.

Answer: It is so found in the seventh conclusion.

11. The chief source of water supply relied upon by the City of Scranton is the stream known as the Roaring Brook and its tributaries, which in dry times falls down in its flow to about five million gallons per day.

Answer: This is in part a duplicate of the eighth, and is so found in the sixth conclusion.

12. To meet the constantly increasing demand for water and to provide an adequate supply the Gas and Water Company have built from time to time storage reservoirs upon the Roaring Brook and its tributaries, and have used the No. 7 dam for several years past merely as a distributing reservoir.

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Answer: It is so found in the eighth conclusion.

13. Commencing in 1886, the water company has built storage reservoirs as follows: Oak Run, with a capacity of four hundred and twenty million gallons; Elmhurst, with a capacity of thirteen hundred million gallons; Meadow Brook, with a capacity of four hundred million gallons; Williams' Bridge, with a capacity of four hundred million gallons; Lake Scranton, with a capacity of twenty-six hundred and fifty million gallons; No. 5, wtih a capacity of thirty million gallons, in addition to No. 7, with a capacity of sixty million gallons.

Answer: It was so found in theeighth conclusion of fact. But being now excepted to by plaintiff it is corrected as hereinabove stated.

14. Of the thirty-two million gallons daily supplied to the City of Scranton, twenty-two million gallons is being supplied from Roaring Brook and its tributaries, and ten million gallons from other supplies as from the Providence water shed and the Meadow Brook water shed.

Answer: It is so found in the sevent conclusion.

15. The Providence water shed and the Meadow Brook water shed are of small area, and are at the present time taxed to their utmost possible supply.

Answer: This is substantially so found in the seventh conclusion.

18. That the distance from the No. 7 dam, which is the distributing reservoir of the Scranton Gas and Water Company, to the headwaters of the Roaring Brook near Lehigh Summit, is about eighteen miles.

Answer: It is so found in the seventh conclusion.

19. The main line of the D., L. & W. R. R. Co. passes along and in close proximity to the Roaring Brook from No. 7 dam to its headwaters near Lehigh Summit.

Answer: It is so found in the tenth conclusion.

20. For the purpose of protecting the water shed, the Scranton Gas and Water Company began about the time they built Oak Run reservoir, to purchase land along the Roaring Brook and its tributaries, and have continued to do so up to the present time,

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as occasion afforded and opportunity to purchase such lands was presented.

Answer: This is not found as stated; but for further answer, so far as concerns the lands in question, reference is made to the twenty-third conclusion.

21. In 1897 and 1898 the Scranton Gas and Water Company bought from the Tobyhanna and Lehigh Lumber Company, and from L. C. Bortree together, several thousand acres along the Roaring Brook, part of which, it is now proposed by the defendant company to traverse by the proposed change of alignment of their railroad.

Answer: This is answered in the twenty-first conclusion except as to the area mentioned.

22. That all of the other lands included in the plaintiffs' bill which will be traversed by the proposed change of alignment of the defendant company's railroad was purchased by the plaintiff company in 1895 and 1906, comprising in all over 400 acres.

Answer: This is answered in the twenty-first conclusion.

25. Three of the proposed reservoirs of the Scranton Gas and Water Company as laid out and intended to be built are along the new change of alignment of the defendant company known in this case as Dam Sites "T," "E" and "F."

Answer: As stated this is not so found, because "the proposed reservoirs" is a misleading term under the facts found. For further answer so far as concerns location reference is made to the twenty-second conclusion.

26. The proposed change of alignment of the defendant company's railroad will cross directly over the reservoir to be erected at Site "T" passing over the waters of the reservoir for a distance of over fourteen hundred feet, and will pass within the flow lines of Sites "E" and "F" for distances of sixteen hundred and twelve hundred feet respectively.

Answer: This is not so found because "the reservoirs to be erected at," etc., is misleading. For further answer as to location reference is made to the thirteenth conclusion.

27. That the proposed change of alignment of the defendant company's railroad between Beck's Mills and Lehigh will cross the

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Roaring Brook and its tributaries at fourteen different places, whereas, the old line crosses the tributaries of the Roaring Brook but once.

Answer: This is so found in the eleventh conclusion.

28. The proposed change of alignment involves about four and one-half miles of track, and shortens the old line but a trifle over one-half mile.

Answer: This is so found. See tenth and eleventh conclusion.

29. That the proposed change of alignment leaves the old line at or near Beck's Mill, crosses the Roaring Brook over the place where the plaintiff company locates their reservoir "T" and continues in a direction generally from thence on the easterly side of the Roaring Brook to a point near its head-waters, whereas, the old line is on the westerly side of the Roaring Brook all the way for the distance involved in the new location.

Answer: This is so found in the eleventh conclusion, except northerly and southerly are there used instead of easterly and westerly as in the request.

30. The defendant company's railroad through the water shed of the plaintiff company is used as a through freight and passenger line between New York and the West, and the trains pass through the water shed on the main line at the present time on an average of once every nine miles.

Answer: For answer see fourteenth conclusion.

31. Twenty of these trains passing over the line of the defendant company's railroad daily are passenger trains, and the balance are coal and through freight trains, carrying cattle, sheep, hogs, horses and other live stock.

Answer: It is so found.

33. That the building of the new alignment as proposed by the defendant company will be a more serious menace to the health of the people supplied and the purity of the water furnished by the plaintiff company than the building of a proposed third track along the old alignment or the adjustment of the curvature along the old alignment of the defendant company's railroad will be a benefit.

Answer: This is negatived in the thirteenth conclusion.

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34. That all of the land described in the plaintiff's bill was purchased by the plaintiff company for the purposes above stated prior to the beginning of any condemnation proceedings to acquire the same by the defendant company.

Answer: It is not so found.

36. That the minutes of the meeting of the executive committee of the defendant company of May 1, 1906, relating to the appropriation or change of alignment aforesaid, are as follows:

"The president presented plans and estimates and cost of building new third track and re-locating present main track between Moscow and Gouldsboro. On motion it was resolved that the change of alignment proposed and recommended be hereby approved, and authority be given to let necessary contracts for the re-location and bliuding of the line as recommended and the building of a third track from Moscow to Gouldsboro. The total estimated cost ot which is about $485,443. Said change will eliminate 320 degrees curvature and shorten the main line 517-1000 of a mile."

Answer: This is answered in the fifteenth conclusion.

37. That the minutes of the Board of Managers of the Delaware, Lackawanna and Western Railroad Company of May 31, 1906, are as follows:

"The regular meeting of the Board of Managers of the Company was held at No. 26 Exchange Place, New York City, May 31, 1906. Present: Chairman, President Maxwell, Baker, Workes, Pine and Graves, Managers. The minutes of the last regular meeting were read and approved. The minutes of the executive committee at the meetings held May 1st, 8th, 15th, 22nd and 29th, were read and on motion the actions of the committee were approved."

Answer: This is answered in the sixteenth conclusion.

38. That the plans submitted to the executive committee, May 1, 1906, for the purpose of the change of alignment differ from the plans and maps filed in court in the condemnation proceedings mentioned in the pleadings, in that the maps and plans filed in the condemnation proceedings are for a greater and different width of property sought to be appropriated than that shown on the maps and plans exhibited to the executive committee at this meeting held May 1, 1906.

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Answer: This is answered in the seventeenth conclusion.

44. The sources of pollution from a railroad passing through a water-shed are two-fold: First, that caused during the period of construction; and second, that caused during the operation, maintenance and repair of the line when built.

Answer: This is answered in the thirteenth conclusion.

51. That both of the parties to this action are public service corporations, and both claim that the use of the land sought to be appropriated by each is necessary in the discharge of their public duties. Conceding some degree of necessity on the part of both corporations, the Court finds under all the evidence that the necessity for the use of this land for its public purposes on the part of the plaintiff company is greater than that on the part of the defendant company.

Answer: It is not so found.

53. In 1880 the consumption of water in Scranton was about 5,000,000 gallons per day, by 1903 it had increased to 20,000,000 gallons per day and at the present time it has further increased to about 32,000,000 gallons per day and there is reason to believe that the continued growth of the city still further and largely increases the consumption.

Answer: This is a duplicate.

54. In view of the rapid increase in the consumption of water and the prospective further increase, it is necessary that the Scranton Gas and Water Company should provide very much increased storage capacity in the water-shed drained by Roaring Brook.

Answer: It is not so found.

55. About 1897 the Scranton Gas and Water Company purchased the pieces of land described in the plaintiff's bill as Numbers 3, 4, 5 and 6, towards the headwaters of Roaring Brook for the purpose of erecting there storage reservoirs which are required for the prospective needs of the company in furnishing an adequate supply of water to the public. The proposed new alignment of the railroad tracks of the defendant company would lie within the flow lines and interfere with the reservoirs proposed to be located upon these tracks.

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Answer: It is not so found.

56. The most available unoccupied location for a storage reservoir which would contain a large supply of water in the basin of Roaring Brook, is that which is called in the testimony the Beck's Reservoir, the dam for which is shown upon the plaintiff's map as dam site "T," and upon the defendant's map as dam site 3 and dam site 4. Of these several locations, that selected by the plaintiff, to wit, dam site "T", is the most natural and available and convenient location, being at the narrowest point of the valley and offering the best and safest foundation for a dam to confine the water within this basin.

Answer: Is is not so found.

57. The parcels of land described in plaintiff's bill and numbered are all within the flow line of the proposed reservoir to be formed by the construction of the dam at dam site "T" and the said lands were purchased and acquired by the Scranton Gas and Water Company at the dates severally mentioned in the bill of the plaintiff for the purpose of the construction of a resrevoir which is necessary for the uses of the Scranton Gas and Water Company. Up to the time of the purchase of these lands by the Scranton Gas and Water Company no compensation had been made or secured to the owners thereof by the defendant railroad company in pursuance of any appropriation thereof.

Answer: It is not so found.

58. The new location of the railroad company's lines as it is stated in the answer and the testimony, would run immediately across the dam built upon dam site "T" and across the reservoir formed by said dam for a distance of 1400 feet. The construction, maintenance and operation of a railroad so related to a storage reservoir would be a source of dangerous infection of the waters intended to be used for drinking purposes and would constitute a menace to the health of the community using such water.

Answer. This is repetition and is answered above.

59. The defendant railroad company before settling upon the re-location of the line from Moscow to Lehigh had had surveys made and estimates prepared for a third track substantially parallel

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to the present tracks between said third track and incidentally to eliminate something of the curvature and reduce the maximum grade without the complete relocation of the line contemplated by teh defendant and that at a lesser cost.

Answer: In its entirety this is not so found. It cannot be said that the railroad company "prepared for a third track substantially parallel," etc.

60. The relocation of the defendant's present tracks between Moscow and Lehigh as contemplated by the defendant is not necessary for the better securing the safety of persons and property and increasing the facilities and capacities for the transportation of traffic thereon in view of the practicability of the accomplishing the same ends on substantially the line of the road as now located.

Answer: It is not so found.

61. There is no evidence in the case that there was any finding or expression of an opinion by the Board of Directors of the defendant railroad company that the change of line contemplated by it was necessary for the better securing the safety of persons and property and increasing the facilities and capacity for transportation of traffic thereon as provided by the act of March 17, 1869.

Answer: This asks for a conclusion of law and is refused.

64. The map and plan submitted to the Executive Committee of the defendant company at the meeting of May 1, 1906, differs from the maps filed in the court by the defendant company in the condemnation proceedings in the following particulars:

(a) Both maps use station 6862 + 67.9 as O on the proposed change of alignment between Beck's Mill and Lehigh. On the map submitted to the Executive Committee the point of the first curve each of said O station begins at station P. C. 8 + 49.9 and the curve continues to station at P. T. 12 + 97.5 on a 2 degree curve with a total angle of 8 degrees and 56 minutes, and with a total length of curve of 447.6 feet. On the map filed in the condemnation proceedings the point of the first curve east of said O station begins at station P. C. 8 + 50 and the curve continues to station at P. T. 13 + 05.1 on a 2 degree curve with a total angle of 9 degrees and 6 minutes, and with a total length of curve of 455.1 feet, showing a difference in the angle of the curve of 10 minutes and a difference

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in the length of the curve of 7.5 feet longer in the map filed in the condemnation proceedings than in the map adopted by the Executive Committee.

(b) The next straight line east of the curve above mentioned on the Executive Committee map begins at station P. T. 12 + 97.5 and continues to station P. C. 88 + 43.8, a total length of straight track of 7546.3 feet. The corresponding straight line of the condemnation map begins at station P. T. 13 + 05.1 and continues to station P. C. 88 + 43.8 and continues to station P. T. 108 +56.1 on a 2 degree curve with a total angle of 40 degrees and 15 minutes, and with a total length of curve of 2012.3 feet, showing a difference in the angle of curve of 5 minutes, and in the length of curve of 4.4 feet shorter on the condemnation map than on the Executive Commitee map.

(c) The next curve east of the straight line last mentioned on the Executive Committee map begins at station P. C. 88 + 43.8 and continues to station P. T. 108 + 60.5 on as 2 degree curve with a total angle of 40 degrees and 20 minutes, and with a total length of curve of 2016.7 feet. The corresponding curve on the condemnation map begins at station P. C. 88 + 43.8 and continues to station P. T. 108 + 56.1 on a 2 degree curve with a total angle of 40 degrees and 15 minutes, and with a total length of curve of 2012.3 feet, showing a difference in the angle curve of 5 minutes, and in the length of curve of 4.4 feet shorter on the condemnation map than on the Executive Committee map.

(d) The next straight line east of the curve last mentioned on the Executive Committee map begins at station P. T. 108 + 60.5 and continues to station P. C. 134 + 38.5, a total length of straight track of 2578 feet. The corresponding straight line on the condemnation map begins at station P. T. 108 + 56.1 and continues to P C. 134 + 31.6, a total length of straight track of 2575.5 feet, a difference of 2.5 feet shorter on the condemnation map.

(e) The next curve east of the straight line last mentioned on the Executive Committee map begins at station P. C. 134 + 38.5 and continues to station at P. T. 155 + 75.2 on a 2 degree curve with a total angle of 42 degrees and 44 minutes, and a total length

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of curve of 2136.7 feet. The corresponding curve on the condemnation map begins at station P. C. 134 + 31.6 and continues to station P. T. 155 + 69.1 on a 2 degree curve with a total angle of 42 degrees and 45 minutes, and with a total length of curve of 2137.5 feet, showing a difference in the angle of curve of 1 minute and a difference in length of curve of .8 feet shorter on the Executive Committee map than on the condemnation map.

(f) The next straight line east of the curve last mentioned on the Executive Committee map begins at station P. T. 155 + 75.2 and continues to station P. C. 188 + 77.2, a total length of straight track of 3302 feet. The corresponding straight line on the condemnation map begins at station P. T. 155 + 69.1 and continues to station P. C. 188 + 68.5, a total length of straight line of 3299.4 feet, showing a difference of 2.6 feet shorter on the condemnation map than on the Executive Committee map.

(g) The next curve east of the straight line last above mentioned on the Executive Committee map begins at station P. C. 188 + 77.2 and continues to station P. T. 217 + 71.2 on a 2 degree curve with a total angle of 57 degrees and 59 minutes, and a total length of curve of 2894 feet. The corresponding curve on the condemnation map begins at station P. C. 188 + 68.5, and continues to station P. T. 217 + 62.7 on a 2 degree curve with a total angle of 57 degrees and 53 minutes, and a total length of curve of 2894.2 feet, showing a difference in the angle of curve of 6 minutes less and .2 feet greater distance on the condemnation map than on the Executive Commtitee map.

Answer: This is believed to be a correct comparison of the mathematical courses and distances shown on the different maps. But the variation is so very slight than when laid on the ground it is inappreciable for any practical purpose in the case. The line was staked on the ground. It is not unlikely that as between any two different surveys in tracing the line so marked some slight variation in the reading of the instrumnet would be inevitable.

PLAINTIFF'S REQUESTS FOR CONCLUSIONS OF LAW.

1. The defendant railroad company had no power or authority to relocate its line or any part thereof after it had once fully located it.

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Answer: As this is understood it was negatived in the second conclusion of law. Formal answer being required by plaintiff, the request is refused.

2. The power of eminent domain may be delegated by the legislature to any person or corporation but having been so delegated to a board of directors it cannot be by them delegated to any individual committee or subsidiary body. The corporate action of an executive committee and board of managers of the defendant company as shown by their minutes of May 1, 1906, and May 31, 1906, respectively, does not constitute an appropriation of the lands covered by the proposed new line for the purpose of widening, straightening or otherwise improving the same within the terms of the act approved March 17, 1869.

Answer: In so far as this asks for an abstract conclusion it is affirmed. So far as it relates to the effect of the corporate action of the board of managers it is refused.

3. The Scranton Gas and Water Company, the plaintiff, not only has the right, but it is its imperative duty under its charter to furnish the City of Scranton and its inhabitants with an adequate supply of pure water so far as it is possible for it to do so, and to this end it not only has the power, but is in duty bound to appropriate all lands and streams which are necessary to enable it to meet this public obligation.

Answer. This is answered in the first conclusion of law.

4. An unauthorized preliminary survey, though well marked by a line of stakes indicating the location of a railroad, cannot be regarded as sufficient notice of a prior legal appropriation of the land.

Answer. As an abstract legal proposition this is affirmed.

5. The power of eminent domain having been conferred upon a corporation for a specific purpose, a discretion to determine whether its exercise for that purpose is necessary being vested in the board of managers, some affirmative action by such board finding the existence of the necessity for the particular purpose is requisite to a legal exercise of the power.

Answer: This is an abstract statement of law, and as such is affirmed.

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6. That the purchase of lands for the purposes of discharging the duties for which it was incorporated by a company having the right of eminent domain constitutes a dedication to a public use.

Answer: If the purchase were made in pursuance of corporate action evincing the purpose assumed in the request it might give rise to a presumption of dedication. The mere fact that title is taken by deed to the corporation within any antecedent or subsequent corporate action tending to devote it to public use doesn't constitute dedication.

7. That under all the evidence and the facts found by the court, the defendant company should be restrained from building its proposed line as located over the reservoirs which would be formed by the construction of dams at sites designated as "E" and "T" in the evidence.

Answer: This is answered in the seventh conclusion of law.

8. That under all the evidence and the facts found by the court, the defendant company should be restrained from building its proposed line as located over the reservoir which would be formed by the construction of dam at site designated as dam site "T" on the plaintiff's map:

Answer. This is answered in the seventh conclusion of law.

These corrections do not alter the character of the case. Stress is laid by the learned counsel on the presumption which is claimed to arise from the fact that the water company had title by purchase. The argument is that by virtue of the Act of April 29, 1874, sec. 34, cl. 4, the company had the same right to acquire lands by purchase for its corporate uses as by condemnation proceedings. Hence, they say, it is to be presumed these lands were held in public ownership and formed a part of its franchises. The argument ignores the fact that no corporate action was ever taken authorizing the purchases or indicating what they were for. If anything of that kind had been done there might be some force in the argument as to the parcels purchased before the defendant made its location. The supposed reservoir site claimed by plaintiff to be most important is "T"—by defendant called "3". Both this and "E" are on lands which had been, so far as plaintiff is concerned,

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fully appropriated by the railroad company before the plaintiff bought with actual notice of the appropriation.

As to the other questions in the case no new argument has been advanced and seeing no reason to change the views heretofore expressed we can add nothing to what was said in connection with the decree **nisi.**

The exceptions are dismissed. Let a decree be submitted by counsel **sec. reg.**

The right to reform a deed giving a life estate with remainder to the children of the life tenant, and to her brothers and their children, so as to vest a fee in the first taker, after a conveyance by the brothers to the life tenant of their interest by warranty deed, is denied in Downey vs. Seib (N. Y.) 8L.R.A. (N.S.) 49, on the ground that there is no one to represent the interests of the unborn children. The devestiture of the estates of persons not in being is the subject of an extensive note to this case.

That a statement of financial condition to secure a line of credit was true when made, is held, in Atlas Shoe Co. vs. Bechard (Me.) 10 L.R.A. (N.S.) 245, not to prevent a rescission of a subsequent sale made on the faith of it, on the ground of fraud, where the contract provided that it might be considered a continuing statement, and a new and original statement upon each and every purchase of goods, and the statement was untrue when the sale which is sought to be rescinded was made.

The right of a tenant to remove from the premises manure produced in the usual course of husbandry upon the farm during his tenancy, is denied in Brigham vs. Overstreet (Ga.) 10 L.R.A. (N.S.) 453, on the ground that such manure became appurtenant to the realty, and is to be considered and treated as a part of the same.

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In the Court of Common Pleas of Lackawanna County, No. 3, May Term, 1907.

EQUITY.

Rule to vacate decree dismissing bill and to have the bill reinstated and to allow amendment.

Edward B. Sturges and George Sanderson vs. The Scranton Railway Company.

The court may upon motion of plaintiff allow him to amend his bill upon such terms as it shall deem reasonable.

Terms will not be imposed when defendant has incurred no costs.

Messrs. Donnelly & Sanderson, and Messrs. Beers & Grambs, for Plaintiffs.

Messrs. Willard, Warren & Knapp, for Defendant.

Opinion by Edwards, P. J.

March 2, 1908.

This case was before us on demurrer to plaintiffs' bill of complaint. Three grounds of demurrer were assigned, the first ground being that the plaintitffs had no standing or right to maintain the bill. On this ground we dismissed the bill. A motion for re-argument was afterwards made and refused.

The plaintiffs now move to amend the bill so as to meet the first ground of demurrer. Equity rule 35 provides that "if, upon the hearing, any demurrer or plea shall be allowed, the Court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable."

We are disposed to allow the plaintiffs' motion in the present case. Nor do we see any reason to impose terms. There are no costs yet incurred by the defendant.

We do not, of course, pass upon the merits of the amendment. The bill, as amended, may again be demurred to.

We make the following order: Now, March 2, 1908, the decree dismissing the bill of complaint in this case is vacated and the bill is reinstated; the amendment prayed for by plaintiffs is allowed, and defendant is allowed thirty days in which to answer to demur.

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In the Court of Common Pleas of Lackawanna County, No. 465, September Term, 1907.

Rule to Show Cause Why Appeal From a Justice Shall Not Be Stricken Off.

T. M. Field vs. B. D. Vail.

Wh re a defendant appeals from an award of arbitrators and omits the word "firmly' in his affidavit on supplemental affidavit can be received to supply th word "firmly" omitted in the original. But where costs are paid on the appeal and the plaintiff received them from the prothonotary such action constitutes a waiver of that undoubted defect.

The requirements of the act of March 25, 1903,. P. L. 61, are for the benefit of the defendant and he may waive all of its provisions.

Mr. P. L. Walsh, for Plaintiff.

Messrs. Vosburg, Dawson & Bonner, for Defendant.

Opinion by Carpenter, A. L. J.

March 2, 1908.

The judgment was entered in this case by the justice on March 8, 1907. On March 25th following the defendant appeared before the justice, paid the costs and gave bail for an appeal, but did not make the affidavit required by the Act of March 25, 1903, P. L. 61. The first day of the next term of court was May 6th, but the appeal was not filed until June 12, 1907, at which time defendant presented his petition to court asking leave to file the appeal, whereupon he was permitted to file the same **nunc pro tunc** as of May 6th, and at the same time, at his instance, under the practice followed in this court, a rule was granted to show cause why the appeal should not be stricken off. This rule came up for disposition at the argument court in February, 1908, at which time an affidavit by the defendant, in accordance with the Act of 1903, was presented and leave of Court was asked to file the same. In the meantime the case was placed upon the trial list for November term, 1907, by praecipe of plaintiff's attorney. Has he waived the defects in the appeal?

In Proper vs. Luce, 3 P. & W,. 65, defendant appealed from an award of arbitrators but in his affidavit made on the appeal the word "firmly" was omitted. The costs having been paid, the plaintiff received his from the prothonotary. A motion was made at the next term to strike off the appeal because of the defect in the

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affidavit, when the defendant made another and perfect affidavit and offered to file it, but was not permitted to do so. The Supreme Court, however, in an opinion by Gibson, C. J., said: "No supplemental affidavit could be received to supply the word 'firmly' omitted in the original. But taking out of court the costs that were paid in on the appeal, was a confirmation of it, and a waiver of that undoubted defect. * * * The appeal, so far from being void, was available for every purpose till it was avoided by the judgment of the Court; and while it was pending, the party was entitled to take out the costs on no other terms than those on which they were paid in, and in no other character than that of an appellee. By receiving the costs from the Prothonotary then he waived all objection."

In Wilson vs. Kelly, 81 Pa. St., 411, plaintiff appealed from an award of arbitrators, but the record did not show that he made any affidavit. Two terms thereafter defendant entered a plea, putting the case at issue, and at the third term the case was on the trial list, and was continued on application of defendant. Three days threeafter, the defendant applied for a rule to show cause why the appeal should not be stricken off. The rule was granted and subsequently made absolute. But the Supreme Court in reversing the judgment, said: "Thus it appears no objection was made by the defendant until nearly nine months after the appeal had been entered. The requirements of the statute are for his benefit. He might waive all of them. The case, however, shows more than the mere passive conduct of the defendant. He had entered a plea thereby imposing on the plaintiff the necessity of preparing for trial. * * * By acts both of omission and commission he had induced the plaintiff to believe that all irregularity was waived."

In the case in hand the plaintiff does not appear to have taken any steps to have the appeal stricken off on the ground that no affidavit was made; the rule to strike off, under our practice, having been taken by the defendant himself, for the reason that the transcript of appeal was not filed in time.

In view of the authorities above cited it seems clear that the circumstances of this case constitute a waiver of all defects and the rule to strike off the appeal is discharged.

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In the Court of Common Pleas of Lackawanna County, No. 158, Janaury Term, 1908.

CERTIORARI.

The New York Merchandise Co. vs. S. W. Arnold, et. al.

A joint judgment against two or more is either good or bad as a whole. It is indivisable and incapable of s paration. It cannot be affirmed as to one and reversed as to the others.

Messrs. L. P. Wedeman and F. M. Gardner, for Plaintiff.

Mr. C. Comegys, for Oefendant.

Opinion by Newcomb, A. L. J.

March 2, 1908.

This record is somewhat ambiguous. It is uncertain whether the intention was to bring suit against a joint stock company in which defendants are concerned, or against them personally as co-partners. Taking the whole record in the light of the briefs submitted it seems probable that the defendants were associated and liable to be sued as a joint stock company organized under the Act of 1874, as "The Rookery Trading Company, Limited." But they must be regarded as sued jointly as co-partners. The judgment was general against all three. The certiorari wasn't taken until after the lapse of more than twenty days.

No doubt the cause of action was within the alderman's jurisdiction. The only question that can now be considered is whether he had personal jurisdiction of the parties.

Judgment was given in default of defendants' appearance, so the question depends on the legality of the service of process.

That the return shows a valid personal service on John W. Aitkin is not questioned. As to his co-defendants the service is as follows: "By leaving at their place of business in the presence of an adult member of their company and handing it to an adult member of the company a true and attested copy of the original summons."

Such service is authorized neither by the Act of 9th July, 1901, P. L. 614, nor any other statute, and is, therefore, invalid. Hence, judgment was only warranted as against John W. Aitkin. As against the other two it was erroneous. This is fatal to it as against

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all three. A joint judgment against two or more is either good or bad as a whole. It is indivisible and incapable of separation. It cannot be affirmed as to one and reversed as to the others.

Boaz vs. Heister, 6 S. & R., 18.

Paine vs. Godshall, 1 Luz. Leg. Reg. 3.

Judgement reversed.

The power of the house of delegates, by its independent action, to raise a committee of investigation, with power to sit during the recess of the legislature after the close of the session of the legislature, is denied in Exparte Caldwell (W. Va.) 10 L.R.A. (N.S) 172.

One to whom a lost check is handed for information as to the owner, who, after learning the owner's name, procures, by means of false representations, the instrument to be left with him, and subsequently appropriates it to his own use, is held, in State vs. Levine (Conn.) 10 L.R.A. (N.S.) 286, to be guilty of larceny.

The responsibility of an editor of a newspaper for the publication of a libel without his knowledge, at a time when he is absent from the office, is denied in Folwell vs. Miller (C. C. A. 2d C.) 10 L.R.A. (N.S.) 332.

Cuba vs. Mississipp Cotton Ol Co. (Ala.) 10 L.R.A. (N.S.) 310, Cuba vs. Mississippi Cotton Oil Co. (Ala.) 10 L.R.A. (N.S.) 310, not to empower a municipal corporation arbitrarily to declare a building used for the storage of cotton seed to be a nuisance, and direct its demolition.

The giving of a nominal consideration for an option to purchase real estate is held in Murphy, Thompson & Co. vs. Reid (Ky.) 10 L.R.A. (N.S.) 195. not to be sufficient to prevent its withdrawal before acceptance.

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In the Court of Common Pleas of Lackawanna County, No. 8, March Term, 1908.

EQUITY.

Rule to continue Preliminary Injunction.

John Gibbons vs. F. W. Lange, et. al.

Where planitiff is owner and in possession of mineral rights, injunction is a proper remedy against threatened invasion; but where defendants are in possession the plaintiff must seek his remedy or establish his right at law.

A plaintiff in ejectment may have the right of estrepement to prevent the mining of coal, and the proceedings respecting such right are regulated by statute.

Mr. T. P. Duffy, for Plaintiff.

Messrs. Vosburg & Dawson, for Defendant.

Opinion by Carpenter, A. L. J.

February, 1908.

In disposing of this rule I shall confine myself to the questions involved in it, and endeavor to avoid prejudging the rights of the parties, which may more properly be considered when the case comes up for final hearing.

John Gibbons, the plaintiff, procured from the Delaware, Lackawanna and Western Railroad Company a lease in writing for two veins of coal in a tract of land in Lackawanna Township and in the City of Scranton. It was dated April 18, 1906, was for the term of two years and was made to John Gibbons doing business as the Gibbons Coal Company, and was signed by him in that manner.

For several years prior to that time John Gibbons and his brother, Michael Gibbons, had been doing bnsiness as the Gibbons Coal Company, and had been mining coal from this tract and dividing the profits between them, under some arrangement with a former owner of the land.

They ceased mining operations about the time of making the lease above referred to, and Michael Gibbons, with the consent of his brother, sold the personal property, including horses, wagons, machinery and appliances, to F. W. Lange, one of the

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defendants, and afterwards gave him a paper in the nature of a bill of sale of such property and the rights under the lease. This paper was signed "Gibbons Coal Company, by Michael Gibbons," and was dated April 18, 1907.

The defendants, claiming the right under this paper, together with some arrangement with the Delaware, Lackawanna and Western Railroad Company, have entered into possession and opened up one of the veins and commenced mining and removing coal therefrom.

It is claimed by them that Gibbons had abandoned the property and that the Delaware, Lackawanna and Western Railroad Company had "caved it in," that is, had filled up the opening. The plaintiff denies that he had abandoned the property and says it was his intention to commence mining operations in the near future.

These disputed matters of fact, and the respective rights of the parties, cannot properly be determined at this time. Where plaintiff is owner and in possession of mineral rights, injunction is the proper remedy against threatened invasion; but where defendants are in possession the plaintiff must seek his remedy, or first establish his right at law. Delaware & Hudson Canal Co. vs. Hughes, 2 Lacka. Leg. News, 21.

A plaintiff in ejectment may have a writ of estrepement to prevent the mining of coal, and the proceedings respecting such writ are regulated by statute. Leininger's Appeal, 106 Pa., St., 398.

There is in this case no such clear right either of possession or property as would warrant us in continuing the injunction.

And now, February , 1908, the preliminary injunction heretofore granted is dissolved.

The doctrine of "last clear chance" is held, in Drown vs. Northern Ohio Traction Co. (Ohio) 10 L.R.A. (N.S.) 421, not to apply where the plaintiff has been negligent, and his negligence continues, and, concurrently with the negligence of defendant, directly contributes to produce the injury.

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In the Court of Common Pleas of Lackawanna County, No. 516, May Term, 1907.

EJECTMENT.

Stephen J. Healey vs. Margaret Healey.

The six months in which to bring an action of ejectment expired in October, 1907; but proof of the service of the rule was not filed until December, 1907.

On account of the delay the Court extended the time thirty days for defendant to bring her action of ejectment.

Mr. A. A. Chase, for Plaintiff.

Mr. John R. McHugh, for Defendant.

Opinion by Edwards, P. J.

March 2, 1908.

The proceedings in this case appear to be brought under the Act of April 16, 1903, P. L. 212. This act provides for an extra territorial service. We think the service of the rule in the present case is in accordance with the provisions of the Act of Assembly; that is, the service is good.

It appears from an examination of the files that the petition for a rule was presented to the Court on April 16, 1907, and that the rule itself was served on the respondent April 29, 1907. The six months in which to bring the ejectment, as provided by the Act of Assembly, expired in October, 1907; but the proof of the service of the rule was not filed until December 16, 1907.

On account of the delay we shall extend the time for the respondent to bring her action of ejectment.

We make the following order: Now, March 2, 1908, the rule on the respondent, Margaret Healey, to bring an action of ejectment is made absolute unless the said Margaret Healey within thirty days after the services of this order upon her shall bring her action of ejectment as prayed for in the petition in this case. A copy of this order to be served on the said Margaret Healey in the same manner as the rule was served upon her.

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In th Court of Common Pleas of Lackawanna County, No. 389 March Term, 1906.

Rule for a New Trial. Rule for Judgment for Defendants. Non obstante veredicto.

Ferguson Kiple vs. Reisman Bros.

Defendants agreed to pay plaintiff $500 if they purchased the property which he offered to them. Plaintiff dealt with defendants and no one else. Negotiations wer carried on between plaintiff and defendants. The father of the defendants, who purchased the property, was not known in the matter until the last moment.

To pay for the property an application for a loan was made by defendants in their name. The check for the loan was made to one of the defendants who endorsed it over to the person from whom the property was purchased. Title was placed in the father of defendants. This was done when the purchase money was paid.

In an action brought by plaintiff to recover the amount which he was to receive for bringing about the purchase and sale, it was held: The defendants cannot defeat plaintiff's claim by the device of placing the property purchased in the name of another, at the last moment, and thus compel the plaintiff to prove a resulting trust.

In order to overturn the effect of a deed, a solemn instrument, and of a mortgage and bond, it would be necessary to have proof that was clear, precise, satisfactory and convincing.

Messrs. H. W. Mumford and L. P. Wedeman, for Plaintiff.

Mr. R. Levy, for Defendants.

Opinion by Edwards, P. J.

March 2, 1908.

This is an action of assumpsit brought to recover from the defendants the sum of $475 and interest. The jury returned a verdict for the plaintiff for the full amount of his claim.

The basis of the action is to be found in the following undertaking:

"Scranton, Pa., 2-19-05. This is to certify that if we purchase property which Mr. Kiple offers to us we agree to pay him $500 for his services. (Signed) Reisman Brothers, per Charles Reisman."

Plaintiff proceeded to perform his part of the contract. Negotiations extended over a period of several months. The property finally offered to the defendants was the Ferguson property, and this was the property that was finally purchased. The question whether Charles Reisman had authority to act for the firm—him-

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self and his brother—and several other questions of fact, were left to the jury with adequate instructions. At any rate, the negotiations were carried on between the plaintiff and the defendants. Bernard Reisman, in whom the title was finally placed, was not known in the matter until the last moment. The plaintiff dealt with the defendants and with nobody else. It appears that it became necessary for the defendants to secure a loan of $6,000 in order to pay for the property. The application for the loan was made for and in the names of Reisman Brothers. The attorney, Mr. Sanderson, was paid by check of Reisman Brothers. The check of $6,000 for the loan was made payable to Charles Reisman who endorsed it over to Mrs. Ferguson. Reisman Brothers paid plaintiff $25.00 on account. This fact was disputed by the defendants, but the jury found it against them. Without referring to other facts showing the active participation of the defendants in the negotiations, it is sufficient to state that the title to the property was placed in Bernard Reisman, the father of defendants. This was done when the purchase money was paid.

We have given the facts very briefly. There is only one question raised and argued by defendants' counsel. It is claimed that the plaintiff cannot recover because the defendants did not purchase the property, the bergain being that they were to pay plaintiff $500 if THEY purchased the property offered by him. The property was purchased by the father, not by the sons; the sons acted as agents for the father; therefore the defendants owe the plaintiff nothing according to the terms of the contract.

The defense does not appeal favorably to a court or jury.

We allowed the jury to pass upon all the questions, and we instructed them that they must find the facts according to the fair weight and preponderance of the testimony. Defendants contend that this instruction was erroneous and that the only way plaintiff could recover would be by his proving the existence of a resulting trust in the father for the benefit of the sons.

The following points, inter alia, were submitted by the defendants:

II.—The plaintiff having alleged that the property which was sold to B. Reisman was, as a matter of fact, sold to B. Reisman

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as trustee, for the two defendants, Charles Reisman and Harry Reisman, it is necessary for the plaintiff to establish the fact that the property purchased by the said B. Reisman was paid for with the money of Charles Reiesman and Harry Reisman, and the rule of law requires the proof that the purchase money was that of the defendants to be clear, precise, convincing and satisfactory.

III.—The burden of proof being upon the plaintiff to establish the facts necessary to prove a resulting trust by evidence that is clear, precise, convincing and satisfactory, the evidence produced by the palintitff to establish the necessary facts fails to come up to that standard, and, therefore, under all the evidence in the case your verdict must be for the defendants.

V.—In order to establish a resulting trust in favor of the defendants in this case the burden of proof is upon the plaintiff to show by evidence that is clear, precise, convincing and satisfactory, that the money paid at the time of the purchase of the property in question was the money of the defendants, and this fact cannot be established by a declaration as testified to by the plaintiff on the part of the defendants, made at some time prior to the time of the purchase that they intended to buy the property in question in the name of their father; nor can the fact be evidenced by reason of proof in the case that one of the defendants paid over the money at the time the deed was delivered, it being necessary to prove by positive evidence that the money as paid was the money of the defendants.

We quote here a part of the charge relating to this question:

"Counsel have argued before the Court, especially the counsel for the defendants, that it requires a certain degree of proof, a certain quality of proof, to establish what is known in law as a resulting trust. The law is that evidence to establish a resulting trust must be of a convincing and satisfactory character, must be clear and precise. For instance, if Reisman Brothers in this case would bring a suit in equity against the father in order to establish that the father was holding this property in trust for them and not as his own, that would be the degree of proof required in such a case. In order to overturn the effect of a deed, a solemn instrument, and of a mortgage and bond, it would be necessary to

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have the kind of proof that I have referred to—that is, clear, precise, satisfactory and convincing, and that it would be further necessary to show beyond a question, at least satisfactorily, to the jury that the money that was paid was the money of Reisman Brothers and not the money of the father. I decline to take that view of this case; I do not think that it requires the degree of proof necessary to establish what is known as a resulting trust, but rather the rule, as I understand it, in a case of this nature and applicable to the facts of this case, is that the plaintiff must make his case out by the fair weight of the testimony, by a fair preponderance of the testimony; that is the rule that I shall apply in this case, and if you find under all the evidence that the plaintiff has made out a case according to that rule of proof, then it will be your duty to find a verdict in favor of the plaintiff for the sum of $475, and interest. If you find, on the other hand, that the Reisman Brothers all through were acting for the father and not for themselves, or that the plaintiff has failed in the degree of proof that I have mentioned, then you would have a right to find a verdict in favor of the defendants."

According to the view taken by us of the case plaintiff performed his part of the contract fully. He found the property and brought the buyer and seller together. Defendants cannot defeat plaintiff's claim by the device of placing the property purchased in the name of another, at the last moment, and thus compel the plaintitff to prove a resulting trust. On a review of the case we are satisfied that as between plaintiff and defendants there is no question of trust. Such a question may arise between the father and sons but that has no place in the present suit. It is true that the plaintiff in his declaration refers to a resulting trust; but we treat this as surplusage. The plaintiff's case is complete without it.

The rule for a new trial and the rule for judgment **non obstante veredicto** are both discharged.

The irregularity in rendering seption for joint tort is held, in Nashville R. & L. Co. vs. Trawick (Tenn.) 10 L.R.A. (N.S.) 191, to be properly cured, even after judgment, by entering the judgment against one defendant and dismissing the action against the others.

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In the Court of Quarter Sessions of Lackawanna County, No. 172, December Sessions, 1907.

APPEAL FROM SUMMARY CONVICTION.

City of Scranton vs. Charles L. Hawley.

Persons living outside of the city cannot run their automobiles in going to or coming from their business, at a rate of speed prohibited by the ordinance and then when arrested plead want of jurisdiction because of non-residence. In order to convict a defendant of a charge of violating the ordinance the evidence must connect the defendant himself with the evidence.

Mr. David J. Davis, City Solicitor, for Plaintiff.

Messrs. Vosburg & Dawson, for Defendant.

Opinion by Edwards, P. J.

March, 1908.

On an appeal this case is here **de novo**. Two questions are raised by the defendant: First, that the automobile ordinance does not apply to the defendant because he resides outside the City of Scranton; second, that the evidence does not connect him with the alleged violation of the ordinance.

The first contention is clearly untenable. Persons living outside of the city cannot run their automobiles, in going to or coming from their business, at a rate of speed prohibited by the ordinance, and then, when arrested, plead want of jurisdiction because of non-residence. Such a plea is technical in the extreme.

The second contention of the defendant is worthy of more consideration. In order to convict the defendant on a charge of violating the ordinance the evidence must connect the defendant himself with the offense. The city has failed to do this in the present case. The two police officers testify to a violation of the speed law by a certain automobile, having a certain number. It appears, according to some automobile register, that a machine having such a number belongs to one C. L. Hawley. That is all the evidence connecting the defendant with the offense complained of. Both officers testify that they could not identify the person who ran the machine. This clearly is an end of the case.

The appeal is sustained and judgment is entered for the defendant.

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In the Court of Common Pleas of Lackawanna County, No. 322, January Term, 1908.

CERTIORARI.

Eastern Hat Company vs. S. Barasch.

The notary's seal is generally regarded as authenticating itself, so far at least as to be held prima facie evidence of his official character. This is so because his authority on that behalf is of common law origin. His power to administer oaths, however, is derived wholly from statute.

Mr. R. A. Zimmerman, for Plaintiff.

Mr. M. Muskovitz, for Defendant.

Opinion by Newcomb, A. L. J.

March 2, 1908.

The alderman rendered judgment against defendant in default of appearance and answer to plaintiff's probated claim. This was in accordance with the Act of 7th July, 1879, P. L. 194. Hence, the only question in the case is whether the account was properly verified by affidavit. It was taken by a notary public in New York and is certified under his official seal. The ground upon which it is attacked is that the official character of the notary is not certified by a court of record in that county. The question thus raised is not free from doubt.

In respect to services connected with commercial paper it is believed that a notary's seal is generally regarded as authenticating itself, so far at least as to be held **prima facie** evidence of his official character. This is so because his authority in that behalf is of common law origin. His power to administer oaths, however, is derived wholly from statute. As to the effect of his seal alone in such cases there is a conflict of authority. In some jurisdiction it will be presumed that a notary of another state has power to take affidavits. Perhaps the weight of authority is the other way.

21 A. & E. Enc. L. (2 Ed.) 565.

We are unable to find that the question has been decided in this State, and no opinion is ventured here because this affidavit is fatally defective for another reason not discussed at the argument.

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On its face, aside from the signature, it purports to be the affidavit of one Jacob Cohen, proprietor of the plaintiff company. It plainly recites that it was he who was sworn. It contains nothing except what he purports to depose and say. Instead of being signed by him in person the signature is: "Eastern Hat Co., Jacob Cohen, Prop. by Nathan Berstad, attorney."

It hardly need be said that this is a material and fatal variance. Cohen could not be sworn by attorney.

It follows that the judgment was unsupported by any competent evidence, and having been given in default of defendant's appearance was irregular. Judgment is, therefore, reversed.

In the Court of Common Pleas of Lackawanna County, No. 319, November Term, 1902.

RULE FOR JUDGMENT.

M. P. Gillespie, Assigned to Thos. Shotten vs. R. C. Rhule, et. al.

A court has no jurisdiction to open a judgment ten years after it was obtained before an alderman and five years after the transcript was entered in the Prothonotary's office.

Messrs. David J. Davis and Edgar A. Jones, for Plaintiff.

Mr. W. S. Huslander, for Defendant.

Opinion by Edwards, P. J.

March 2, 1908.

The judgment in this case was entered upon a transcript of an alderman. The judgment before the alderman was rendered in December, 1897, and the transcript was filed in the Prothonotary's office October 17, 1902. The defendant, Sarah Rhule, presented her petition to open the judgment as to her in November, 1907, more than ten years after judgment was obtained before the alderman and more than five years after the transcript was entered in the Prothonotary's office.

We have decided in Place vs. Mullarkey, 5. Lack. Jurist, 248, that we have no jurisdiction to open a judgment in a case like the one now before us. And, if we had jurisdiction the defendant is guilty of laches: Littster vs. Littster, 151 Pa., 474.

The rule to open judgment is discharged.

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In the Court of Common Pleas of Lackawanna County, No. 8, January Term, 1908.

EQUITY

George H. Haverly, et. al. vs. The School District of the Borough of Throop, et. al.

The power of discretion, altogether legislative and in no degree judicial, is committed by the Legislature, in the matter of schools, to the directors of the school districts. If the directors refuse to perform their duties the court can compel them. If they transcend their powers the court can restrain them, but if they exercise their unquestionable powers unwisely there is no judicial remedy. Nevertheless, if the tax levied is clearly in excess of the sum required its collection may be enjoined.

It is within the juridiction of a court of equity to restrain the collection of a school tax when the sum is clearly excessive and unwarranted.

The officers of a school district have no discretionary power to levy a tax in excess of the amount required for the necessary and legitimate expenses of a school district.

Mr. J. G. McAskie, for Plaintiff.

Messrs. J. J. Toohey, and O'Brien and Kelly, for the Defendant.

Opinion by Edwards, P. J.

March 2, 1908.

Plaintiffs seek to restrain defendants from collecting the school tax levied for the year 1907-08 on the ground that the amount of the levy is clearly in excess for the sum necessary to maintain the schools for the present year.

The case came before me on a rule for preliminary injunction: but as the evidence was fully heard on both sides the parties agreed that the hearing should be final and that the necessary pleadings would be filed to put the case at issue according to the equity rules.

I find the following

FACTS.

1. The borough of Throop and the school district are coterminous in territory. The plaintiffs are residents and taxpayers of the borough and school district.

2. The assessed valuation of the borough for the present fiscal year amounts to $3,301,660.

3. On this valuation the school directors levied fifteen mills for general school purposes and three mills for building purposes.

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4. The parties have agreed that the correctness in the assessments, exonerations, abatements, commissions, etc., will amount to fifteen per cent. of the valuation. On this basis the total revenue of the district, including the state appropriation, will amount to $50,000, being about $42,000 for general school purposes and about $8,000 for building purposes. In fixing these amounts as the anticipated revenue of the district, the question of the pending appeals from the assessments of coal properties has not been taken into consideration.

5. Plaintiffs' claim that the school expenses for the present year will be less than $15,000, not including any sum for the redemption of bonds; but the figures given by the sceretary, who was sworn for the plaintiffs, include many items not found in plaintiffs' schedule. Such items as the following:

Grading and fencing around the high school,	$2,000.00
Desks and seats, ...	515.00
Four additional rooms in No. 2 school	10,000.00
Additional building	8,000.00

The school district has no sinking fund for the redemption of bonds, the bonded indebtedness being $15,500. The interest and whatever bonds have been redeemed have been paid out of the general school fund and the school board proposes to redeem some of the bonds out of this year's revenue. If the board proceed with the contemplated improvements, which under the evidence are undoubtedly necessary, the expenditures will run pretty close to $40,000. It is true that no official action has been taken by the directors formally committing them to the erection of the additional buildings needed, the reason evidently being that the directors do not know the amount of money that will be raised by taxation this fiscal year because of the appeals that are pending in court.

6. The borough of Throop is a mining town. Ninety per cent. of the taxes are levied on coal properties. The last fiscal year coal was assessed at a valuation of $25 per foot acre; this year the assessment has been fixed at $100 per foot acre. All owners of coal properties in the borough, as well as throughout the county, have appealed from the assessments, and those appeals are now pending in court.

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CONCLUSIONS OF LAW.

The law relating to the discretionary power of school boards in the matter of taxation is well settled. As was said in the case of Wharton vs. School Directors, 42 Pa., 358: "The power of taxation, altogether legislative and in no degree judicial, is committed by the Legislature in the matter of schools, to the directors of school districts. If the directors refuse to perform their duties the court can compel them. If they transcend their powers the court can restrain them. If they misjudge their power the court can correct them. But if they exercise their unquestionable powers unwisely, there is no judicial remedy."

Nevertheless, if the tax levied is clearly in excess of the sum required, its collection may be enjoined: St. Clair School Board's Appeal, 74 Pa., 252; Connors' Appeal, 103 Pa., 356; Mitchell v. Kearne, 16 Sup. Ct., 354.

In the present case it is not at all clear that the school board has unlawfully exercised its discretionary power. It is impossible to state now how much revenue the school district will receive for this fiscal year. Ninety per cent. of the assessment is appealed from. Those appeals have not yet been heard. If the assessments should be reduced by the court there would be a corresponding reduction in the taxes. Should the assessment of coal at $100 per foot acre be sustained, it may be then that the plaintiffs would be in a position to complain. As the case is now before us the uncertainty is too great to warrant an injunction.

We conclude,

1. That the plaintiffs have failed to present a case entitling them to an injunction.

2. That the plaintiffs' bill should be dismissed.

PLAINTIFFS' REQUEST FOR FINDINGS OF FACT.

I have found all the facts necessary for the determination of this case; but I have answered plaintiffs' request at the risk of unnecessary duplication.

1. That the plaintiffs are residents and taxpayers of the school

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district of the borough of Throop, and the defendants are the school district of the borough of Throop, Lackawanna County, Pennsylvania, and the collector of taxes for said school district.

Answer: I find as requested.

2. That the school district of the borough of Throop and the borough of Throop are co-terminous in territory.

Answer: I find as requested.

3. That the assessed valuation of the borough of Throop for the present fiscal year is three million, three hundred and one thousand, six hundred and sixty dollars.

Answer: I find as requested.

4. That the assessed valuation of the borough of Throop for the fiscal year 1906-07 was five hundred and ninety-six thousand, three hundred and twenty-three dollars.

Answer: I find as requested.

5. That the tax levy made by the said school district for general purposes for the fiscal year 1906-7, was thirteen mills upon each dollar of the assessed valuation.

Answer: I find as requested.

6. That on October 21, 1907, the school directors of said school district, by resolution, fixed the tax levy for the school year ending June 1, 1908, at fifteen mills for general school purposes, and three mills for building purposes, upon each dollar of the assessed valuation.

Answer: I find as requested.

7. That the school directors of said district have increased the the levy for general school purposes for the present fiscal year two mills over the levy made for like purposes for the preceding fiscal year.

Answer: I find as requested.

8. That in accordance with said levy of eighteen mills a tax duplicate was made out and placed in the hands of the collector of said district with instructions to collect the tax thus levied and said collector is now collecting said taxes.

Answer: I find as requested.

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9. That fifteen mills upon a valuation of $3,301,660.00 will produce for general school purposes, 45,524.90 and three mills for building purposes will produce 9,904.98

A total for all purposes of .....$ 59,429.88

Answer: I find as requested.

10. That after deducting fifteen centum for rebates, exonerations, commissions, etc., there will be a net amount raised by taxation for general school purposes of .....$ 42,096.17 and for building purposes of 8,419.25

A net total for all purposes of .....$ 50,515.42

Answer: I find as requested.

11. That the state appropriation and other assests will increase the fund for general school purposes to $44,841.17, making total resources of the school district $53,260.61, for the present fiscal year ending June 1, 1908.

Answer: This conclusion is problematical. Plaintiffs take it for granted that the pending appeals affecting ninety per cent. of the assessment will make no difference in the amount of revenue to be realized by the school district. It is this element of uncertainty that makes an injunction impossible in this case. The directors had the right to consider this question in making their levy.

12. That the expenses of the school district for the present fiscal year, chargeable to the general fund amount to $16,620.50, and is represented by the following items:

Salaries of teachers and musical instructor,	$7,635.00
Salaries of Janitors	675.00
Salary of Secretary	150.00
Salaries of Auditors	60.00
Expenses attending County Institute	150.00
Text book and supplies	1,000.00
Coal, wood and water	1,800.00
Printing	80.00
Sinking fund and interest	2,450.00

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Bank note and interest	1,060.00
Repairs	150.00
Desks, tables, etc.	262.50
Incidentals	150.00
Bills outstanding June 1, 1907	1,000.00
Total	$16,622.50

Answer: For answer to this request I refer to my fifth finding of fact.

13. That the total resources for general school purposes for the present fiscal year will exceed the expenditures to the amount of $28,218.67.

Answer: Refused.

14. That no official action, either at the time of making the levy or since, although a period of nearly eight months of the fiscal year has elapsed, has been taken by said school directors to make use of the amount levied for building purposes, with the exception of asking for bids for grading the high school grounds.

Answer: I find as requested.

15. That the levy of fifteen mills made by the school district of the borough of Throop for general school purposes for the fiscal year 1907-8, is, under all the evidence in this case, clearly excessive.

Answer: Refused.

16. That the amount levied for building purposes is more than sufficient to meet the requirements of the school district for the present fiscal year.

Answer: Refused.

PLAINTIFFS' REQUESTS FOR CONCLUSIONS OF LAW.

1. That the school directors of the school district of the borough of Throop, are legally bound to levy a tax for the legitimate and necessary expenses of said school district, upon the last adjusted valuation of the borough of Throop as fixed and determined by the commissioners of Lackawanna County.

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Answer: As a general proposition of law this is correct. The difficulty with the point is that it takes for granted the valuation has been finally "adjusted."

2. That it is within the jurisdiction of a court of equity to restrain the collection of a school tax, when the same is clearly excessive and unwarranted.

Answer: Affirmed.

2. That the officers of a school district have no discretionary power to levy a tax in excess of the amount required for the necessary and legitimate expenses of a school district.

Answer: Affirmed and is applicable when it clearly appears that the levy is in excess of the amount required.

4. That the plaintiffs are entitled to an injunction restraining the school district of the borough of Throop, and the tax collector of said district from collecting taxes under the present levy.

Answer: Refused.

5. That the plaintiffs are entitled to a decree directing and requiring said school district to levy a tax for general school purposes upon the assessed valuation of taxable property in said district, as fixed and determined by the commissioners of Lackawanna County, sufficient to meet the necessary and legitimate purposes and expenses of said school district for the present fiscal year, and not in excess thereof.

Answer. Refused.

6. That the plaintiffs are entitled to the relief prayed for in their bill of complaint.

Answer. Refused.

DECREE.

Now, March 2, 1908, this cause came on to be heard at a time agreed upon by counsel, and was argued by counsel, and upon consideration thereof it is ordered, adjudged and decreed as follows: The plaintiffs' bill is dismissed and the school district of Throop borough is directed to pay the costs.

The prothonotary is directed to enter the above decree nisi. Exceptions sec. reg. within ten days.

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In the Court of Common Pleas of Lackawanna County, No. 1526, *September Term,* 1907.

Foreign Attachment.

Rule to Quash.

W. W. Baylor vs. J. W. Baylor, Defendant, and W. W. Baylor, Garnishee.

Where personal property is attached the Act of Assembly requires that the sheriff shall make a declaration as to the property attached, "in the presence of one or more creditable persons of the neighborhood." Such a declaration is not required when land is attached.

"Actual possession" has a definite meaning in law. There is actual and constructive possession, or possession in fact and possession in law. The law annexes constructive possession to the legal title or ownership of property where there is a right to the immediate possession of such property, but no actual possession.

Possession in fact exists where the thing is in the immediate "occupancy" of the party, his agent or tenant.

The omission of the word "actual" in the return of a sheriff in a foreign attachment proceeding is a substantial error.

A foreign attachment is a severe remedy and the requirements of the law as to the return of service should be strictly complied with. No essential element should be left to implication.

Messrs. Everett Warren, Joseph O'Brien and John F. Scragg, for Plaintiff.

Mr. Charles H. Soper, for Defendant.

Opinion by Edwards, P. J.

March 16, 1908.

The petition for the rule and the answer thereto refer to several quotations which cannot be considered on a motion to quash the writ of foreign attachment in this case. It appears that the plaintiff and defendant are brothers and that they own "Baylor's pond" in common, it being a part of their inheritance from their father; but this is a phase of the case which is outside of the record. The only question before us is the regularity of the writ and the validity of the sheriff's return. If the return is in accordance with law the motion to quash must be denied and the rule discharged. We shall therefore consider the regularity of the proceedings only.

From the praecipe and the writ itself we find that the property

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attached is the interest of the defendant in "unoccupied lands," covered by water and known as Baylor's Pond. The sheriff's return to the writ is as follows:

"Lackawanna County s.s. served the within writ this 16th day of September, 1907, on W. W. Baylor, being the person in possession under the defendant of the Lands described in the writ viz.: the undivided one-half interest in and to said described premises, summoned the said W. W. Baylor, as Garnishee, as provided by Law in the presence of John B. O'Malley, James Fleming and Gustave Kotzwinkle, three credible witnesses of the neighborhood having made to him the declaration as to the contents of said writ, and as to J. W. Baylor, defendant Nihil Habet.

"So Answers P. F. Calpin, Sheriff, per P. V. Scanlon, Deputy."

It will be noticed that the return is a combination of two kinds: the one, where personal property, and the other, where lands, are attached. Where personal property is attached the Act of Assembly requires that the sheriff shall make a declaration as to the property attached, "in the presence of one or more credible persons of the neighborhood." Such a declaration is not required when land is attached. Counsel for plaintiff claim that this part of the return may be treated as surplusage. This may be correct, and we would very likely concede this proposition if the return were otherwise in accordance with law. We are of the opinion that the omission of the word "actual" in the return is a substantial defect. "Actual possession" has a definite meaning in law. There is actual and constructive possession, or possession in fact and possession in law. The law annexes constructive possession to the legal title or ownerhsip of property where there is a right to the immediate actual possession of such property, but no actual possession. Possession in fact exists where the thing is in the immediate "occupancy" of the party, his agent or tenant. How can we say from the return to the writ what kind of possession is meant? It is no answer to say that a pond of water is not the subject of actual possession. According to its nature it may in law be in the actual possession of its owner or his tenant just as much as any other land.

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There is express authority for the proposition that in case of a defective return to a foreign attachment, the writ itself should be quashed: Sterrett, et. al. v. Howarth, et. al. 76 Pa., 438; Jackson v. Wurzburger, 14 Luz. Leg. Reg., 211.

A foreign attachment is a severe remedy, and the requirements of the law as to the return of service should be strictly complied with. No essential element of service should be left to implication.

The rule to quash the writ of foreign attachment in this case is made absolute, and the writ is quashed at the costs of the plaintiff.

The satisfaction of a debt on receipt of 30 per cent of its amount is held Melroy v. Kemmerer (Pa.) 11 L.R.A. (N.S) 1018, to be supported by sufficient consideration, where the debtor contemplated bankruptcy. and the creditor dissuaded him threfrom and accepted his offer of 30 per cent in satisfaction of the debt, received the amount, and closed the account.

A certificate of acknowledgement to a deed stating that two persons whose names are subscribed to the instrument appeared and acknowledged "that he executed the same" is held, in Hughes v. Wright (Tex.) 11 L.R.A. (N.S.) 643, not to be so defective as to prevent the recording of the instrument, since the word "each"' may be supplied by construction.

One obtaining a conveyance from the state under an unconstitutional statute providing for the disposal of land upon which the taxes are delinquent by so-called redemption is held, in Bradbury v. Dumond (Ark.) 11 L.R.A. (N.S.) 772, to have sufficient color of title to perfect a title by adverse possession under the statute of limitations. A note to this case reviews the other authorities on effect of an invalid tax deed as color of title within general statutes of limitations.

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In the Court of Common Pleas of Lackawanna County, No. 204, *January Term,* 1908.

CERTIORARI.

Commonwealth of Penna. vs. Labatore Valazore.

In the body of a transcript it appeared that the return was on oath. The constable's return did not appear to have been sworn to. The jurat was not signed by the alderman. Held: that the alderman had jurisdiction both of the cause and the parties and that the record was entirely sufficient, as the body of the transcript showed that the return was on oath.

Mr. Morgan S. Kaufman, for Defendant.

Opinion by Newcomb, A. L. J.

March 2, 1908.

Judgment in this case was in default of defendant's appearance. It is objected that judgment was irregular because there was no proof of service. The objection is founded upon the circumstances that as endorsed on the back of the writ the constable's return doesn't appear to have been sworn to. The jurat is not signed by the alderman. In the body of the transcript it does appear that the return was on oath. This is sufficient. The presumption is that the absence of the alderman's signature from the jurat was merely a clerical omission.

It is further objected that the action, being penal in character and effect, was begun by summons without information. The proceeding was under the Act of May 11, 1901, P. L. 162, providing a penalty for the unlicensed sale of intoxicating liquors. The statute does not in express terms authorize suit in assumpsit. While it gives jurisdiction to an alderman it is somewhat obscure as to the form of action intended. But we are not convinced that assumpsit is not authorized by necessary implication. Clearly summary proceedings are not warranted, and it is not apparent that defandant was prejudiced for want of formal information.

We think the alderman had jurisdiction both of the cause and the parties and that the record is entirely sufficient.

The judgment is affirmed.

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In the Court of Common Pleas of Lackawanna County, No. 57, November Term, 1907.

REASONS FOR A NEW TRIAL.

George B. Schooley vs. Hulda C. Crawford and James G. Shepherd.

The court will not disturb a verdict which is sustained by the overwhelming weight of the evidence.

Messrs. S. B. Price, Clarence Balentine and George M. Watson, for Plaintiff.

Messrs. James H. Torrey, Everett Warren, Joseph O'Brien, R. H. Patterson and Ralph W. Rymer, for Defendants.

Opinion by Edwards, P. J.

March 2, 1908.

Thirty-six reasons for a new trial are assigned on behalf of the plaintiff. Twenty of the reasons relate to the admission or rejection of evidence; the other sixteen relate to the charge of the court. The reasons relating to the charge contain copious extracts from it without any suggestion or explanation as to the error found therein. Counsel could have included all these reasons in one and say that they complained of the charge of the court, and then give the extracts. It is true that the extracts given relate to the various phases of the evidence; but so far as any light is thrown on any possible errors, the whole charge might as well have been the subject of one reason for a new trial.

We have examined and reviewed the charge with the result that we do not see how we could change it in any particular.

Nor are we impressed with the reasons relating to the evidence. Some of them are of a trivial character, while others relate to matters which were ruled upon after argument and deliberation.

The case was remarkably well tried on both sides and was argued for about two days. The jury were out but a short time and their verdict is sustained by the overwhelming weight of the evidence.

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In the Court of Common Pleas of Lackawanna County, No. 12, *September Term,* 1907.

IN EQUITY.

Supplementary Findings.

Scranton Gas & Water Co. vs. W. C. Hall.

By virtue of a deed the plaintiff came into peaceable possession of reservoirs and lands appurtenant thereto. Being so in possession plaintiff's status was equivalent to that of a riparian owner. That was decisive of its rights as against the defendant who was an upper riparian proprietor on a tributary stream.

Messrs. Willard, Warren & Knapp, for Plaintiff.

Mr. S. B. Price, for Defendant.

Opinion by Newcomb, A. L. J.

March, 1908.

November 23, 1907, a decree *nisi* in this case was entered on the findings of the trial judge. The decree was adverse to the plaintiff, but for the reasons stated in that connection, jurisdiction was retained to afford plaintiff an opportunity to establish its rights in an action at law. In all other particulars the conclusions both of fact and law were in plaintiff's favor. The only trouble with its case was the failure to show a right in the subject matter of the alleged injury, which was the threatened pollution of the waters flowing in Leach's creek. The bill averred plaintiff's right of property in the stream and lands connected with it, acquired by the exercise of its power of eminent domain, and held in public ownership as part of its franchises as a water company. There was an utter failure of any proof conforming to this allegation. Not only that; there was no proof of a private right. At the utmost it amounted only to a scintilla of evidence that plaintiff had possession of lands through which the stream flows, including certain reservoirs located thereon. Manifestly that was inadequate to the purposes of the bill. Refusal of the injunction asked for was inevitable. The bill could have been dismissed and the parties thereby concluded. The proceedings, however, was full of suggestion that plaintiff had some right in the premises and that it ought to be susceptible of proof. For that reason, considering the nature of the case, and aiming to avoid a possible miscarriage of

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justice, it was believed to be equitable to refuse the injunction without prejudice and retain the bill to enable plaintiff to make out its right at law. Instead of resorting to a suit at law the water company, by its counsel, filed petition alleging oversight and asked that the decree *nisi* be opened so that the defect in its proof could be supplied so far as to show a riparian right. This would avoid circuity of action and it was accordingly so ordered.

From the supplementary evidence I find the following:

CONCLUSIONS OF FACT.

1. For some years—the evidence doesn't show how many—prior to May, 1900, the Providence Gas and Water Company was in the actual possession of the lands in question in the township of South Abington through which Leach's creek flows, including the reservoirs mentioned in the former findings. Its possession was under a claim of title by purchase. The company used and enjoyed the premises and the water collected in the reservoirs as part of a system of water supply from which, during its occupancy, it furnished water to the Providence section of the city.

2. May 1, 1900, the company executed and delivered to the plaintiff a deed purporting to convey to the latter all and singular its rights, franchises and property, describing *inter alia* the lands in question, including those where the reservoirs are located. The deed is fully set forth in the supplementary evidence. It is recorded in the proper office of this county in deed book No. 185, at page 397, etc., to which reference is made for its contents. It is too voluminous for copy here.

3. January 16, 1892, the Scranton Gas and Water Company had filed with the proper office at Harrisburg its acceptance of the constitution of 1874. May 1, 1900, the company in due form accepted the provisions of the general Corporation Act of April 29, 1874, and its several supplements. Thereupon letters patent were issued to it in due form.

4. July 18, 1900, the Providence Gas and Water Company by certificate in due formmade return to the office of the Secretary of the Commonwealth that by virtue of the consent of its stockholders,

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given at an election held May 1, 1900, for that purpose, sale had been made to the Scranton Gas and Water Company of all and singular the former company's property, rights and franchises of whatsoever kind and character.

5. May 1, 1900, the plaintiff company suceeded the Providence company in the actual possession of the lands and reservoirs in question claiming title under the deed of that date. In that possession it has continued ever since, furnishing a water supply from that source to the public in the Providence section of the city, as stated in the former findings, in the ostensible exercise of its public functions.

From these facts arise the following:

CONCLUSIONS OF LAW.

1. Whether the reservoirs and lands appurtenant thereto are held by the plaintiff in public ownership is not entirely clear and need not be decided. By virtue of the deed of May 1, 1900, the plaintiff acquired whatever rights the former company had in the premises. It has ever since then been in peaceable possession under color of title.

2. Being so in possession plaintiff's status is equivalent to that of a riparian owner. That is decisive of its right as against the defendant who is an upper riparian proprietor on a tributary stream. Hence, as stated in the former findings, the bill may be maintained to restrain pollution of the water by any use of defandant's land not reasonably necessary to its useful and beneficial enjoyment.

3. So far as the former conclusions vary from those now stated they are vacated and supplied hereby.

4. The defendant and those acting at his instance or under his authority should be enjoined from casting or discharging waste of any kind from his butchering operations upon the surface of the field between his slaughter house and the stream called Hall's creek; also from depositing stable manure either in the cement basin or elsewhere on the ground between his stable and the creek unless the place of such deposit be suitably covered so as to prevent drainage thence into the stream.

5. The circumstances of this case are such that each party should pay his own costs.

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Let the former decree be vacated and a decree *nisi* be now entered in accordance with the fourth and fifth conclusions above, and exceptions, if any, be filed within ten days after notice *sec. reg.*

The fact that the impressions made on the minds of jurors in a condemnation proceeding by a view of the premises cannot be included in a bill of exceptions is held, in Zanesville M. & P. R. Co. v. Bolen (Ohio) 11 L.R.A. (N.S.) 1107, not to deprive a reviewing court to the right to reverse the judgment rendered in the trial court as against the weight of evidence, where the bill of exceptions contains all the evidence given at the trial, and the record is otherwise complete.

Dogs are held, in State v. Soward (Ark.) 11 L.R.A. (N.S) 117, to be within the meaning of a statute providing that larceny shall embrace every theft which unlawfully deprives another of his personal property; and therefore to be within the meaning of a statute making one liable to punishment who shall wilfully kill any animal of another which it is made larceny to steal.

Sufficient excuse for the appointment of a receiver of a growing crop without notice is held, in Henderson v. Reynolds (Ind.) 11 L.R.A. (N.S.) 960, not to be shown by an allegation by one claiming an interest in it, that it must be harvested without delay, and that, if notice is given to the one in possession, he will cut and remove it before the hearing, and, being insolvent, will thereby deprive claimant of his interest.

One who sells carriages to another under contract that they shall be paid for on delivery is held, in Frech v. Lewis (Pa.) 11 L.R.A. (N.S.) 948, to lose his right to maintain replevin for them in case payment is not made, where for two and one-half months he seeks to secure payment without asserting his right to the property.

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In the Court of Common Pleas of Lackawanna County, No. 853,

September Term, 1907.

Exceptions to Report of Viewers.

In Re: Paving Sixth Avenue, Scranton.

The remedy where viewers fail to award damages is by appeal.

Mr. D. J. Davis, City Solicitor, for city.

Messrs. Vosburg & Dawson, for exceptants.

Opinion by Newcomb, A. L. J.

March, 1908.

So far as the exceptions go the failure to award damages the remedy of the exceptants is by appeal. We have no jurisdiction of the question of damages in this way.

It is further objected that the assessment was not according to benefits but by the foot front rule. We have frequently held that in a built-up section, as this is, the foot front rule is not an improper standard of apportionment after the total amount of benefits to be assessed is ascertained. That is what was done here and the objection on that ground cannot be sustained.

The only other question is whether the viewers first determined what should be paid by the city and then treated the balance as benefits.. If they made the assessment in that way it would be erroneous. The deposition of only one of the viewers was taken. The examination was meager and the result somewhat ambiguous. But the testimony is on the whole consistent with the report. It is there shown that they first ascertained the probable cost of the improvement: that the total benefits were determined, and the balance was then assessed upon the city.

This was entirely regular and the presumption is that the report is true and correct. The burden of affirmative proof is on those alleging it to be untrue. Such proof is lacking here and for that reason the exceptions are dismissed and the report confirmed finally.

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In the Court of Common Pleas of Lackawanna County, No. 746, November Term, 1907.

Rule for Divorce A Mensa et. Thoro and Alimony.

Mattie Warren vs. John Warren.

Cruel and barbarous treatment which is a ground of divorce a mensa et thoro, under the Act of 1817, has been held to be actual personal violence to the wife or the reasonable apprehension of it: or such a course of treatment as endangers her life or health and renders cohabitation unsafe.

Mr. J. F. Gilroy, for Plaintiff.

Opinion by Carpenter, A. L. J.

March, 1908.

This application is based upon the allegation that the husband has by cruel and barbarous treatment endangered the life of the petitioner, and has offered such indignities to her person as to render her condition intolerable and her life burdensome, and thereby forced her to withdraw from his house. The husband, although residing within the County and duly served, did not appear, and the evidence is undisputed, and the testimony of the wife is corroborated by other witnessess in most of its essential features.

The facts established are peculiar. The libellant and the respondent were married in May, 1896, she being his third wife. She is now thirty-three years of age, while he is about sixty. They have five children, the oldest being eleven, and the youngest three years old. The respondent's treatment of his wife has been harsh and unkind during their entire married life. He accused her of being intimate with other men and disowned her children. He frequently struck her and pulled her hair, and threw things at her. He kicked and bruised her, and on one occasion, at least, struck her with a club; he called her vile names, and has refused to furnish her and the children sufficient to eat. For the first seven or eight months he and his son by a former wife have been living on the second floor of the house, and he has barred the door against his wife and refused to permit her to go into the rooms which they occupy, and has threatened that if she "touched the doors he would take her old black heart out." His treatment of her has injured her health, and made her

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nervous and feeble, and it is evident that cohabitation could not longer subsist between them without personal danger to the wife.

The cruel and barbarous treatment which is a ground of divorce a mensa et. thoro(under the Act of 1817, has been held to be actual personal violence to the wife, or the reasonable apprehension of it; or such a course of treatment as endangers her life or health, and renders cohabitation unsafe. Butler v. Butler, 1 Purs. Eq. Cas. 344. This definition has been frequently approved. Jones v. Jones, 66 Pa. St., 494. In this case there have been not only repeated acts of personal violence, but reasonable cause to fear the continuance thereof; and we can readily believe, from the evidence, that the respondent's treatment of his wife has been such as to bring her case clearly within the rule above referred to. This being the case she is entitled to a decree, with such alimony as her husband's circumstances will admit of, not exceeding the third part of his annual income. The evidence shows this to be in the neighborhood of twenty-five hundred dollars.

In view of the circumstances of this case we think the libellant is entitled to the annual sum of seven hundred and twenty dollars as her alimony, to be paid in monthly installments of sixty dollars each month, and a decree will be entered accordingly.

And now, to wit, this day of March, A. D., 1908, the Court having heard this case, and having fully considered and proceeded to determine the same as to law and justice appertain, do grant and decree unto the said Mattie Warren, the libellant, a divorce from bed and board of the said John Warren, the respondent; and having fully considered the circumstances of the said John Warren, the Court allow to the said Mattie Warren, the annual sum of seven hundred and twenty dollars as her alimony, beginning with the date of this decree, to be paid in monthly installments of sixty dollars each, payable on the first day of each month, the first payment thereof to be payable on the first day of April, A. D. 1908, to continue until a reconcilliation shall take place between the said Mattie Warren and the said John Warren, and the further order of the Court suspending or annuling the present decree.

And it is further ordered that the costs of this proceeding be paid by the respondent, John Warren.

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In the Court of Common Pleas of Lackawanna County, No. 340, *March Term,* 1907.

Demurrer to Plaintiff's Statement.

F. Kiple vs. M. Dinner, et. al.

In a case where the writing mentioned no consideration and none was averred in the declaration specific performance cannot be enforced
Where the writing grants an option it is unnecessary that it should contain mutual and dependant covenants.

Mr. H. M. Mumford, for Plaintiff.

Messrs. Vosburg & Dawson, for Defendants.

Opinion by Newcomb, A. L. J.

March 9, 1908.

This action is ejectment to enforce specific performance of an alleged contract at suit of the vendee. The demurrer raises the general question whether the contract is invalid as being within the statute of frauds.

Certain negotiations evidenced by writings signed either by both parties or the defendant alone are averred. These began September 11, 1906. Manifestly they expired by limitation and were abandoned January 9, 1907. The plaintiff's case, if any, is founded on a paper signed and delivered to him by defendant a few days later. It is as follows:

Scranton, Pa., January 12, 1907.

"I agree to sell my property at 337 Penn Ave. to F. Kiple for sum of ten thousand dollars if paid within twenty days. Property is at 337 Penn Ave., Scranton, Pa.

(Signed) "M. DINNER."

It is not claimed that the money was paid or tendered within the twenty days, but that before the expiration of that time the terms of payment were modified by parol. The averment is that the vendor agreed to accept $3,000 cash and a bond and a mortgage for the balance; that he then accepted $500 on account of the down payment and fixed February 4, 1907, as the date for exchanging the papers; that on that day the vendee made legal tender of $2,500, asked for the deed and offered to execute the securities, but that the vendor then refused to consummate the sale.

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It is objected, 1, that being unilateral the paper shows no contract capable of specific performance because it lacks mutuality; 2, that the subsequent modification by parol of the terms of payment reduce the contract wholly to parol and thereby leaves the transaction within the statute of frauds; 3, that it is incapable of specific enforcement because it is uncertain as to its subject matter.

No hesitation is felt in saying that by the writing it was intended to grant an option. As such it was unnecessary that it should contain mutual and dependent covenants. It was enough that they would have become mutual the moment the plaintiff elected to exercise his option had he done so according to its terms.

Smith's Appeal, 69, Pa., 474.

The third objection is regarded as untenable. That is certain which is capable of being reduced to certainty. Under this rule the identity of the property is sufficiently ascertained by the writing.

These views, however, are applicable only to an option that lacks no essential element of a contract. Like any other contract an option must be supported by sufficient consideration or be under seal.

21 A. & E. Enc. L. (2 Ed.) 926.

In this case the writing mentions no consideration. Neither is any averred in the declaration. The plaintiff, therefore, fails to show a case for specific performance.

The question raised by the second objection is by no means free from difficulty. We will not undertake to decide it at this time. Believing the contract as set forth to be invalid for want of consideration the demurrer is sustained without prejudice to plaintiff's right to move within fifteen days for leave to amend.

The right to specific performance of a contract for exchange of real estate is held, in Powell v. Dwyer (Mich.) 11 L.R.A. (N.S.) 978, not to be defeated by the insertion in the contract, by the scrivener without consultation with the parties, of a clause that for the true performance of the contract each binds himself to the other in the penal sum of $100, to be paid to the party not in default, where the properties are situated in different cities and are valued at several thousand dollars.

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In the Court of Common Pleas of Lackawanna County, No. 331, *January Term,* 1908.

RULE FOR DIVORCE.

Marion Finch vs. Carrie Finch.

Bad temper is not sufficient ground to warrant the Court to grant a divorce.

Mr. John R. Jones, for Plaintiff.

Opinion by Carpenter, A. L. J.

March, 1908.

The grounds for divorce set forth in the application in this case are: First, desertion, which is alleged to have taken place May 31, 1907; second, that the respondent has by cruel and barbarous treatment endangered the life of the libellant; third, that the respondent has offered such indignities to the person of the libellant as to render his condition intolerable and life burdensome, and thereby forced him to withdraw from her house and family.

The proof shows that the parties were married in April, 1902, and lived together until May 31, 1907, when the wife left her husband's home and went to Scranton where she is now living with her brother-in-law.

Of course no decree can be entered at this time based upon desertion which occurred but ten months ago.

With reference to the other grounds alleged in the petition the evidence in support of them is that of the husband alone, with the single exception of the testimony of Loren Wright who testifies to nothing more than that the wife told him she got mad and was mean to her husband. He lived within a third of a mile of these parties and called occasionally at the house and says he never heard them have a word. The sum of the husband's testimony relative to cruel and barbarous treatment is that his wife had a bad temper and that they frequently quarreled, and that "when she would get through quarreling she would pout around and wouldn't say anything." That this conduct on her part made him feel bad, unhappy and miserable. But he seems willing to endure the pain of her displeasure and tolerate her, for he says he has tried repeatedly to get her to return and

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live with him; and Mr. Wright testified that the libellant sent him to see if he could persuade her to come back.

Bad temper is not a ground for divorce; and there is clearly not sufficient evidence of cruel treatment in this case to warrant a decree separating these parties from the bonds of matrimony.

And now, March 1908, the rule is discharged and decree refused.

A statute providing that actions for wrongs done to the property rights or interests of another shall survive the death of the wrongdoer is held, in Bates v. Sylvester (Mo.) 11 L.R.A. (N.S) 1157, not to include a widow's claim for negligent killing of her husband.

One in possession and control of a ferocious wolf on a public highway is held, in Hays v. Miller (Ala.) 11 L.R.A. (N.S.) 748, to be liable whether he is the owner or not, for injuries inflicted by it on another person.

The *corpus delicti* of arson is held, in State v. Piennick (Wash.) 11 L.R.A. (N.S) 987, not to be established by merely showing that a building has been burned; but it is held, that in addition by the wilful act of some person criminally responsible.

An attorney who is employed by the mother of an illegitimate child to assist in the prosecution of bastardy proceedings, under a contract by which he is to be paid an attorney's fee out of the fund recovered, is held, in Costigan v. Stewart (Kan.) 11 L.R.A. (NS.) 630, to be entitled to a lien upon such fund for his fees.

An injury which could not have been foreseen or reasonablly anticipated as the natural and probable result of an act of negligence is held, in Kreigh v. Westinghouse C. K. & Co. (C. C. A. 8th C.) 11 L.RA. (N.S.) 684, not toi be the proximate cause, but either the remote cause, or no cause whatever, of the damage.

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In the Court of Common Pleas of Lackawanna County, No. 317, March Term, 1905.

RULE FOR A NEW TRIAL AND ALSO FOR JUDGMENT FOR DEFENDANT NON OBSTANTE, ETC.

James Toolin vs. the City of Scranton.

A city is not bound to make a culvert suitable to extraordinary conditions of the weather nor to answer for an error of the engineer's judgment in not providing for consequences that engineering skill and experience could not be expected to foresee.

There is no case that suggests that a municipality can take advantage of an error of judgment on part of a subordinate executive officer.

Messrs. Burns and Rutherford for plaintiff.

Mr. R. D. Stuart, for defendant.

Opinion by Newcomb, A. L. J. March 23, 1908.

The declaration in this case is not free from ambiguity. In a general way it charges faulty construction of a public bridge over Fall Brooffi by the defendant city so that the culvert was insufficient to pass the water flowing in the stream in times of ordinary freshets. On the trial we held that it imposed on plaintiff the burden of showing the injury complained of was the proximate result of negligence in the construction of the easterly abutment. This may have unduly narrowed the true scope of the inquiry. But if so it was to the plaintiff's prejudice only, and having got the verdict he cannot now complain.

The bridge carries Brooklyn street over the brook. It was rebuilt and widened in 1897 in the exercise of the city's general authority over its streets. As compared with the old abutment the new one was extended seven feet up stream. For the purposes of the trial the stream was treated as flowing southerly and the street as crossing it at right angles. Plaintiff's home is on the northerly side of the street and perhaps a hundred feet easterly from the bridge. The course of the stream and the shape of the lot are such that at the nearest point the distance of the lot from the channel is perhaps fifty feet. The lot is low and the area between it and the channel is vacant.

The injury in question was occasioned by the overflow of the stream in two instances whereby plaintiff's premises were flooded. This was alleged to be due to the lodging of the floating ice at the

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bridge whence the water backed up until it escaped from the channel.

There was no specific provision by ordinance or other formal action for rebuilding the bridge. The evidence suggests that a plan may have been drawn by the city engineer, but it was not definitely so shown. The evidence tended to show that the abutments were built by a special contractor, but the terms of the contract, if any, were not shown. In its entirety the work was under the direction of the engineer.

That the stream had overflowed to the detriment of plaintiff's property at the times alleged was not controverted. It was disputed, however, that the overflow was due to any deficiency of the culvert, and claimed on the other hand that it occurred only in times of extraordinary floods, being favored by the shallowness of the channel and the low formation of the adjacent land.

It is believed that the issue of fact thus defined was submitted with adequate instructions. It was made plain to the jury that the city was not bound to make the culvert suitable to extraordinary conditions of the weather, nor to answer for an error of the engineer's judgment in not providing for consequences that engineering skill and experience could not be expected to foresee. They were instructed that plaintiff could only recover upon three questions being found affirmatively in his favor, as follows:

1.—Was the character of the abutment such as to form a substantial obstruction?

2.—Was the injury complained of due to that obstruction?

3.—Could the engineer in the exercise of his professional judgment have foreseen that the abutment would be likely to form such obstruction?

The only reason pressed for new trial is the very general one that the verdict was against the weight of the evidence. It must be a very exceptionl case that would warrant the court in saying that. We might not have found the facts as the jury did, but that alone is no reason for disturbing the verdict, which ought to stand if the case was for the jury.

The motion for judgment is based on the refusal of defendant's request for binding instructions. The instruction wsa asked on the theory, 1, that there was no evidence of any overflow except in times of ex-

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traordinary freshets; 2, that if the trouble could be traced to the bridge it was due solely to a faulty plan and that its inadequacy would have to be attributed to an error of judgment of a public official—the engineer—for which the city isn't responsible.

Review of the evidence as to the character of the freshets confirms our first impression that it was conflicting and raised a question for the jury.

The other question is not so free from difficulty. The exact ground of distinction between faulty plans and faulty construction doesn't seem to have been made entirely clear by the cases. The attempt to confine the doctrine of immunity to those cases where the public improvement can be made or not in the discretion of the authorities cannot be sustained.

In *Schieb vs. Township, 11 Atl., 366,* the injury complained of was practically the same as in this case. It arose from the location and construction of a public bridge. The culvert was alleged to be inadequate. The report is very meagre, but apparently it was a case of necessary repairs and not a public improvement to be made or omitted at discretion. The exemption of the township was affirmed on the ground that the injury, if any, was due to an error of judgment on part of the supervisors, who located and constructed the bridge "after consideration."

In the case before us it is not claimed that the plan of this bridge was first considered and adopted by the city councils. That under the authorities would seem to be decisive against the claim of immunity arising from an error of judgment. There is no case so far as I am aware that suggests that the municipality can take advantage of an error of judgment on part of a subordinate executive officer. The discretion involved, if any, would be that lodged in the councils, and that, they cannot delegate.

The attempt to state a rational distinction between a bridge that obstructs the passage of the water and one having a culvert insufficient for such passage is somewhat elusive. Yet comparing *Schieb vs. Township, supra, with Krug v. St. Mary's Boro., 152 Pa., 30,* such distinction seems to have been taken. Unless they are to be distinguished on the mere ground that in one case the plan was first adopted by the

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proper authorities and in the other it was not. In the latter case the borough bridged a stream having a total span of less than 23 feet between abutments. Instead of a single span two were made by erecting a centre pier. This was claimed to be the source of the trouble. It divided the bridge in two spans of about nine feet each. The water backed up and overflowed by reason of the accumulation of driftwood at the pier. The question having been left to the jury it was found that this was negligent construction. Judgment on the verdict for plaintiff was affirmed. It doesn't appear that any question of municipal discretion or error of judgment of a public official was raised, but we fail to see how it could have been ignored if it had any application to the case. It is believed to rule this case. Yet it suggests, that if as in *Schieb vs. Township,* the design had been adopted by the borough authorities "after consideration" it would require some further "consideration" to enable one to see the difference between the two. True, as already noted, in the Schieb case it would seem to be the height of the span that was claimed to be insufficient. In this, as in the Krug case, it may be said to have been the natural channel of the stream that was altered. Just how that can make any rational difference, except in the facility of proving negligence, is not apparent. The natural channel of a water course may be changed and obstructed with impunity in the establishment of a sewer system if it be due to an error of judgment in adopting the plan.

Collins vs. City, 93 Pa., 272.

This was the principle applied to the bridge in Schieb vs. Township.

Hence, unless there be an essential difference between an obstruction arising from the width of a culvert and one arising from its height, the cases would seem to give color, at least, to the theory that liability will depend on the mere question whether the work was done in conformity with a plan adopted by the municipal authorities "after consideration." Whether so or not we are not called upon and do not undertake to decide. It is enough to say that on its facts we can see no difference in principle between this case and Krug vs. St. Mary's Boro., *supra.*

Both rules are discharged. Judgment to be entered on the verdict for plaintiff, *sec. leg.*

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In the Court of Common Pleas of Lackawanna County, No. 1, May Term, 1907.

IN EQUITY.

John W. Pellio vs. Bull's Head Coal Company, et. al.

An officer in the defendant company represented to the plaintiff, who was the owner of five shares of stock in the said company, that the financial condition of the company was precarious. Upon this representation the plaintiff sold his five shares for $1,000. The stock was paid for by the check of defendant.

The evidence showed further that at the time the officer made the representation that the defendant had a large amount of cash in the treasury; that the operations of the said defendant company had greatly increased and that the officers had paid out large sums in the guise of salaries without the authority of the board of directors and without the knowledge of some of the directors.

As soon as the plaintiff discovered the unlawful acts of the officers of the company he proceeded with reasonable diligence to secure re-assignment of his stock. He made a tender of the $1,000 with interest, which tender the defendant declined to accept.

Held: That the plaintiff is entitled to a decree directing the defendant company to re-assign to the plaintiff the five shares of stock assigned or surrendered to the company on the payment by the plaintiff to the said company the sum of $1,000, with interest.

Also, that the plaintiff is entitled to an injunction restraining said company and its officers from selling, transferring or assigning the plaintiff's said five shares of stock to any other person than the plaintiff.

Mr. S. B. Price, for Plaintiff.

Messrs. I. H. Burns and C. Comegys, for Defendants.

Opinions by Edwards, P. J.

March. 1908.

There are several questions presented to us by the bill, answer and evidence in this case; but the main question and the only question we shall decide is the right of the plaintiff to a decree compelling the defendants, one or the other or both to re-assign to him five shares of the capital stock of the Bull's Head Coal Company.

We find the following:

FACTS.

1. The Bull's Head Coal Company was organized and incorporated in January, 1901, for the purpose of mining coal in the *City* of Scranton. The authorized capital stock was $25,000, divided into 250 shares each of the par value of $100. The evidence shows that

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$22,500 of the stock was issued and that some time after the organization of the company the stock was held as follows:

Charles A. Burr, 100 shares.
David J. Whiteford, 90 shares.
William M. Whiteford, 10 shares.
W. E. Stibbs, 10 shares.
Ira T. Brown, 5 shares.
Eugene F. Marsh, 5 shares.
J. W. Pellio, (Plaintiff) 5 shares.

2. The company after its incorporation proceded to mine coal. Charles A. Burr was president of the company and David J. Whiteford was secretary and treasurer. The company had directors: Burr, Whiteford, Whiteford, Marsh and Pellio; but the business of the company was carried on in a very informal way, the president and the secretary (Burr and Whiteford) being in charge of the business and conducting it as they saw fit. There were no stated meetings of the board of directors, except the annual meeting held when the parties met as stockholders. Mr. Burr died in June, 1904, and from that time to September, 1906, the business of the company was managed by David J. Whiteford, aided in an informal way by Mrs. Burr, who became the owner of the Burr stock—one hundred shares.

3. The plaintiff, at the solicitation of David J. Whiteford, sold his five shares of stock to the Bull's Head Coal Company for the sum of $1,000, on August 17, 1906. The plaintiff himself does not know whether Whitford or the company was the purchaser, the transfer of the stock certificate having been signed in blank; but the evidence shows that the stock was paid for with the company's check, signed by Whiteford as treasurer. The plaintiff, claiming that fraud had been practiced upon him and that he had been deceived as to the financial condition of the company and as to the value of the stock, demanded a re-assignment of his stock, tendering to Whiteford, and through him to the company, on March 17, 1906. The re-asignment of the stock was refused.

4. The offer to buy plaintiff's stock came from Mr. Bradbury who was acting for one or both of defendants. Before agreeing to sell his stock, plaintiff consulted Whiteford, as to the condition of the

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mine and the value of the stock. The substance of the information given the plaintiff was that the mine was about worked out and that three hundred dollars would be a good price for his stock. This information was not only misleading; it was false; and the evidence pointing to this conclusion is of a very convincing character, as will be seen from our next finding.

5. The mining operation carried on by the defendant company was a small one. When the operation was started, the president and treasurer each had a salary of $75 per month as compensation for managing the affairs of the company. Sometime afterwards these two officers each received $500 per month. Up to April 1904, they had drawn from the treasury of the company in salaries, the sum of $25,000. In April 1904, the salary of each of the two persons named was $1,000 per month and we find that the sum of $49,000 was paid out in this way from May 1904, to July 10 1906. The $1,000 per month was paid to Mr. Burr a month or two before he died and the same sum was continued to his widow. Whiteford received the same sum. The payment of these large sums in the guise of salaries was without the authority of the board of directors and without the knowledge of some of the directors. The evidence shows further, that the time Whiteford was arranging to buy plaintiff's stock and when Whiteford said the stock was worth only $300, the company had a large amout of cash in the treasury; that is, on July 31, 1906, the cash balance was $14,496.01, and on August 31, 1906, it was $13,278.38.

6. It is established by the evidence that the defendants, one or the other of them, purchased the stock of Mr. Marsh, five shares, and that an effort to buy the stock of Ira T. Brown, five shares, from the executor of Brown, through Mr. Reynolds, attorney for the estate. Whiteford made the same kind of representations to Mr. Marsh and Mr. Reynolds that he had made to the plaintiff. He said that the property of the company was exhausted and that the assets of the company consisted of some old mine cars, some mine mules and some worn out machinery. There seems to have been a systematic effort on the part of the defendant Whiteford, to buy out the small stockholders at as low a price as possible, and to accomplish this purpose, that the property was, to say the least, unduly depreciated, and the actual

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condition of the company concealed. Nothing was said as to the distribution of $49,000 in salaries in about two years to two of the officers of the company without authority of law.

7. It is not necessary for us to ascertain the precise value of plaintiff's stock when he sold it to the company. It is sufficient to state that the value of the stock was much in excess of the amount paid for it, and that the plaintiff was induced to part with his stock by means of false representations made by the defendant who was acting in his own interest, and in the interest of the other large stockholder.

8. About November, 1906, David Spurks became interested in the Bull's Head Coal Company. He bought 100 shares of stock from the Burr estate, paying $15,000 for it; five shares from E. F. Marsh and five shares from the Brown estate. For the 110 shares he paid altogether over $19,000. He knew that the company had purchased the plaintiff's five shares, because he saw the certificate of stock, marked "cancelled" in the treasury. Spruks re-organized the company in the sense that the company had new stockholders, a new board of directors and new officers, and the company continued to mine coal. The company, as a corporation, was the same.

9. When Spruks and his fellow-stockholders took charge of the company, the money in the treasury was a part of the assets. The new stockholders had the benefit of all the assets, and the testimony of Spruks is that there was about $13,000 in the treasury.

10. I can find no laches on the part of the plaintiff in the assertion of his rights. As soon as he discovered the unlawful acts of the officers of the company, he proceeded with reasonable diligence to secure a re-assignment of his stock.

CONCLUSION OF LAW.

The only question that can be considered in this case is the right of the plaintiff to a return of his stock to him on payment to the company of the sum tendered to it on March 18, 1907. Having found as a matter of fact that plaintiff was deceived by an officer of the company as to the value of the stock, and that an intentional fraud was committed by the company upon the plaintiff, I have no hesitation in concluding that the plaintiff is entitled to a re-assignment of his stock.

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Plaintiff's counsel claims that the court has the power in the present case to inquire into the business of the company; to order an accounting, and to compel the repayment into the company's treasury of the large sums of money fraudently taken therefrom under the guise of salaries. This position is untenable. These questions may arise as soon as the plaintiff becomes again a stockholder. The defendant company at the instance of a stockholder may be compelled to take legal measures to recover moneys unlawfully appropriated by its officers; and on the failure of the company to do so, after notice, a stockholder possibly may do so. But this question is not before us now. The prayer of the plaintiff for such relief is denied.

The attorney for the Bull's Head Coal Company and for David Spruks and the new stockholders makes three points:

First: There were no false representations made to the plaintiff as to the value of his stock and the condition of the company. This contention has been found against the company. The fraud was of a very gross character.

Second: The plainaiff being a director, and therefore, a trustee of the company, failed in his duty to the corporation. I do not see how this doctrine applies under the facts of the present case. If a creditor, as a third party, claims that a director of a corporation has become individually liable to such third party, by reason of failure on the part of the directors to perform his duty under the law, the principle invoked as above stated might apply. The controversy in this case is between a stockholder of a corporation and the corporation itself.

Third: David Spruks and the stockholders who came into the company with him have the standing of innocent parties. A sufficient answer to this contention is that Spruks has no standing in this case. He is not a party to the record. He is simply a stockholder in the company. The corporation itself remains the same. There has been no break in its existence. When Spruks bought the 110 shares, a controlling interest in the company, he knew of the payment of large salaries to the officers and he knew, through the Marsh suit, that there was a claim of the fraudulent conversion of the company's funds. It

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is true that he did not know of the plaintiff's claim along these lines. He saw the certificate of plaintiff's stock in the company's treasury and He saw the certificates of plaintiff's stock in the company's treasury and he knew it was marked "cancelled"; but he made no inquiry as to the condition under which the certificate was surrendered. At any rate, the change in the ownership of the stock of the company, or the transfer of stock from one person to another—a matter of common occurrence, did not change the liability of the corporation to answer any legal claim existing against it. Whether Spruks had one share or 110 shares is immaterial. The plaintiff's suit is against the corporation itself and not against my particular stockholder. I can find no merit in this contention.

The attorney for David J. Whiteford has presented requests for conclusion of facts and of law. While these requests will be answered in the proper place, they are of no importance. I cannot see my way clear to make a decree against Whiteford in this case.

The formal conclusions of the law are as follows:

1. The plaintiff is entitled to a decree directing the Bull's Head Coal Company to re-assign to the plaintiff the five shares of stock assigned or surrendered to the company on August 17, 1906, on the payment by the plaintiff to the said company of the sum of One Thousand Dollars, with interest from August 17, 1906, to March 18, 1907.

2. The plaintiff is entitled to an injunction restraining the said company and its officers from selling, transfering, or assigning the plaintiff's said five shares of stock to any other person than the plaintiff.

3. The cost of these proceeding should be paid by the Bull's Head Coal Company, one of the defendants.

PLAINTIFF'S REQUEST FOR FINDING OF FACTS.

1. The Bull's Head Coal Company, one of the defendants, was a corporation organized under the laws of the State of Pennsylvania, by charter dated January 11, 1900. The capital stock was twenty-five thousand dollars, divided into two hundred and fifty shares, each of the par value of one hundred dollars.

Answer: I find as requested.

2. David J. Whiteford and Charles A. Burr, now deceased,

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were the promoters of the company, and owned nearly all of the capital stock. Said Burr was the owner of one hundred shares and David J. Whiteford was the owned of ninety shares.

Answer: I find as requested.

3. Immediately after the organization in 1900, the corporation began the mining and selling of anthracite coal at a place known as Bull's Head, on or near North Main avenue in the city of Scranton. Charles A. Burr was president, and D. J. Whiteford, was secretary and treasurer.

Answer: I find as requested.

4. Soon after the company organized the stockholders of record were as follows: Charles A. Burr, 100 shares; David J. Whiteford, 90 shares; Wiliam M. Whiteford, 10 shares; W. E. Stibbs, 10 shares; Ira T. Brown, 5 shares; Eugene F. Marsh, 5 shares; and the plaintiff, 5 shares. The total amount of capital stock issued being 225 shares—twenty-two thousand five hundred dollars.

Answer: I find as requested.

5. Said Charles A. Burr and David J. Whiteford had control and management of the company, and paid dividends to the stockholders from time to time. These dividends were paid without regular action of the board of directors, the payment being left to the president and treasurer.

Answer: I find as requested.

6. No regular meetings of the board of directors were held except that for organization after the annual stockholders' meeting of each year.

Answer: I find as requested.

7. There was no action of the board of directors authorizing the payment of salaries to Messrs. Burr and Whiteford. From February 1900, to May 1, 1904, they drew and divided between themselves twenty-five thousand dollars—at times, five hundred dollars a month each. From May 1, 1904, to July 1, 1906, they drew and divided between themselves forty-nine thousand dollars. There was also paid in July, 1906, one thousand dollars. Making a total of

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seventy-five thousand dollars. On July 31, 1906, there were in the treasury of the company, deposited in bank, fourteen thousand, four hundred and ninety-six dollars and one cent. On August 31, 1906, there were thirteen thousand, two hundred and seventy-eight dollars and thirty-eight cents.

Answer: I find as requested, except that I make the total sum $74,000. The difference is not of any importance. The amount in the treasury is stated correctly.

8. C. A. Burr died in June, 1904. No meetings of the stockholders or directors were held from January 13, 1904, until November 12, 1906.

Answr: I find as requested.

9. On March 7, 1905, ten shares of stock were purchased by the company from its profits, which left the stock outstanding at that time twenty-one thousand, five hundred dollars. This was the stock owned by W. E. Stibbs.

Answr: I find as requested.

10. In February, 1905, the Bull's Head Coal Company employed Charles E. Bradbury to write to stockholders and ascertain what the outstanding stock could be purchased for. February 18, 1905, Mr. Bradbury wrote Mr. Pellio and asked him what he would take for his stock. On the 28th, he again wrote as follows: "I have no reply to my letters of a few days ago. Will you not name a price on the Bull's Head stock and give me a short option? This plant is not in a condition to warrant any high figure."

Mr. Pellio went to see Mr. Whiteford, and said to him: "I have had an inquiry for the stock," and asked what it was worth. Mr. Whiteford said it was all worked out and it wasn't worth much of anything—told him that if he got three hundred dollars for five shares that would be all it was worth. Mr. Pellio asked Mr. Whiteford if he knew who it was that was endeavoring to buy the property, and he said he did not know, but he had given an option to one of the drivers at twenty thousand dollars, and added: "I don't think he will be foolish enough to pay that price, and if he doesn't I think we had better take ten thousand for it."

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Mr. Pellio, afterwards met Mr. Whiteford and asked him if the customer spoken of would take the property, and he said no, that they had changed their mind. Mr. Pellio then offered ten thousand dollars for the property and Mr. Whiteford said he would let him know in the course of a week. Mr. Whiteford called him up afterwards and said he had changed his mind. Mr. Bradbury had written other stockholders, among them the holders of the Brown stock.

In the summer or fall of 1906, Mr. Whiteford had a conversation with Mr. Brown, executor of Ira T. Brown, in the presence of H. C. Reynolds, in which he said that the property was practically exhausted, was of no value, that its assets consisted of a lot of old broken down machinery, a few mules and some mine cars. This meeting and conversation was brought about by an inquiry from Bradbury as to what the Brown estate would sell the stock of the Bull's Head Coal Company for. After this conversation Mr. Whiteford was told by Mr. Reynolds that the executor could not act intelligently without an examination of the books. Mr. Whiteford immediately said if that were true he didn't care whether he got the stock or not. The Brown estate afterwards sold to Mr. Spruks for about five hundred dollars a share.

In several conversations afterwards held between Whiteford and the plaintiff in the case, Whiteford represented the property to be of no value.

Answer: This is not a request for a finding of fact. It is only a recital of some of the evidence. My own findings of fact sufficiently cover the matters referred to in the request.

Answer: I find as requested.

11. After the death of Charles A. Burr Whiteford assumed the control and supervision of the business of the corporation.

12. The payment of salaries to Charles A. Burr, Mrs. Burr and David J. Whiteford was not known to the plaintiff in this case until action was brought by E. F. Marsh, sometime in the summer or fall of 1906 to cancel an assignment of his stock. David J. Whiteford individually and as treasurer of the Bull's Head Coal Company, knowing of the value of the stock of the Bull's Head Coal Company, and the

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value of its property, endeavored by false representations to purchase the stock of the plaintiff and other members of said corporation. And the said Whiteford obtained the five shares of stock of plaintiff by said misrepresentations of its value and by concealing the fact of the payment of the alleged salaries and the large surplus in the treasury.

Answer: I find as requested.

13. On the 17th of August, 1906, the plaintiff sold and assigned in blank, his five shares of stock to the said David J. Whiteford, or to the Bull's Head Coal Company, relying upon the representations of said Whiteford as to the value of said stock, and without knowing that the funds of the company had ben misappropriated by said David J. Whiteford and others.

Answer: I find as requested.

14. Eugene F. Marsh sold his five shares of stock to D. J. Whiteford on August 11, 1906. Marsh brought a suit in equity to annual the sale. On the 7th of November, 1906, Mr. Spruks testifies he purchased the Marsh stock for two thousand dollars, and an attorney fee. He also testifies that he bought the hundred shares of the Burr estate for fifteen thousand dollars. On November 5, 1906, he purchased the five shares of stock of the Brown estate for two thousand, two hundred and fifty dollars. Said Spurks did not become a stockholder of record until June 3, 1907, as shown by the certificates to him for seventy-five shares of stock, and these seventy-five shares are the only shares of stock then or at any time issued to Mr. Spruks of record.

15. A meeting of the stockholders was held November 12, 1906, at the office of C. Comegys, in the Dime Bank Building. There were present S. S. Spruks, D. J. Spruks, J. Vipond, W. M. Whiteford, C. Comegys, and D. J. Whiteford. J. Vipond, W. M. Whiteford and D. J. Whiteford were the only stockholders of record at that meeting, either in person or by proxy.

16. D .J. Spruks at the time he purchased the stock of E. F. Marsh and the stock of the Ira T. Brown estate, in November, 1906, had full knowledge of the misappropriation of funds of D. J. Whiteford and others. The money in the treasury was afterwards distributed by those acting as directors and officers, to he stockholders. This appears by the testimony of D. J. Spruks.

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Answer: While the facts stated in the 14th, 15th and 16th requests are substantially correct I do not consider them material in this case. The purchase of stock by Mr. Spruks made no difference in the corporate character and liability of the Bull's Head Coal Company; and I have held that the stock of plaintiff was purchased by the company.

17. On the 18th day of March, 1907, plaintiff tendered to D. J. Whiteford one thousand dollars with interest from the 17th of August, 1906, being the amount he received for said stock with interest from the date it was paid to him, and demanded a return of his certificate of five shares of stock of the Bull's Head Coal Company. It was refused, and thereupon the plaintiff filed the bill in this case.

Answer: I find as requested.

18. The Bull's Head Coal Company by its answer in this case clearly appeared to defend the action of those heretofore in control of the company, and joined the defendant Whiteford in an attempt to avoid a remedy for the wrongs suffered by the plaintiff.

Answer: I find as requested.

REQUESTS OF ONE OF THE DEFENDANTS, THE BULL'S HEAD COAL COMPANY, FOR FINDINGS OF FACT.

Many of the requests presented on both sides of this case are similar in character; but I shall answer them all so that no fact may be omitted.

1. The Bull's Head Coal Company, one of the defendants, is a corporation organized under the laws of the State of Pennsylvania by charter dated January 11, 1900. The capital stock was twenty-five thousand dollars, divided into two hundred and fifty shares, each of the par value of one hundred dollars.

Answer: I find as requested.

2. David J. Whiteford and Charles A. Burr, now deceased, were the promoters of the company and owned nearly all of the capital stock. Said Burr was the owner of one hundred shares and David J. Whiteford was the owner of ninety shares.

Answer: I find as requested.

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3. Immediately after the organization in 1900, the corporation began the mining and selling of anthracite coal at a place known as Bull's Head, on or near North Main avenue in the city of Scranton. Charles A. Burr was president, and D. J. Whiteford was secretary and treasurer.

Answer: I find as requested.

4. Soon after the company organized, the stockholders of record were as follows: Charles A. Burr, 100 shares; David J. Whiteford, 90 shares; William M. Whiteford, 10 shares; W. E. Stibbs, 10 shares; Ira T. Brown, 5 shares; Eugene F. Marsh, 5 shares; and the plaintiff, 5 shares. The total amount of capital stock issued being 225 shares—twenty-two thousand five hundred dollars.

Answer: I find as requested.

5. Said Charles A. Burr and David J. Whiteford were allowed and permitted by the board of directors to control and manage the business of the company at the plant. The payment of all dividends and moneys for the purpose of running the business was left to them.

Answer: This is true in a certain sense. Nothing was done by the directors as a board authorizing the payment of dividends or salaries. Burr and Whiteford and Whiteford's brother, together held 200 of the 225 shares of stock and the business was managed by Burr and Whiteford regardless of the board of directors.

6. Only once a year, and that during the month of January, were meetings of the stockholders and directors held. The corporation had no written by-laws until after the meeting of the stockholders held on November 12, 1906, and after David Spruks had acquired a majority of the stock, for the purpose of properly organizing the company.

Answer: I find as requested.

7. That from February, 1900, to September 30, 1906, J. S. Pellio, the plaintiff, was a director and stockholder of the company, and as such, with the other directors, permitted and allowed Messrs. Burr and Whiteford to draw large sums of money from the treasury on account of salaries and for other purposes connected with the business.

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Answer: See the answer to the fifth request.

8. C. A. Burr, the president, died in June, 1904. There was no vice-president. On January 13, 1904, J. W. Pellio, with the other directors, were re-elected and continued to be directors until November 12, 1906, when the company was reorganized. From the death of Charles A. Burr, in June, 1904, to August 17, 1906, at which time J. W. Pellio sold his stock, no effort was ever made by or call issued by J. W. Pellio for a meeting of the stockholders or board of directors for the purpose of electing officers or for any other purpose.

Answer: I find as requested. The reorganization referred to in the request simply means that other persons became the owners of some of the stock and that other persons became officers of the company. The company as a corporate entity remained the same.

9. That the Bull's Head Coal Company never employed Charles E. Bradbury, without the consent, express or implied, of the plaintiff in this case for any purpose, and that D. J. Whiteford never made any representations as to the value of the stock of the Bull's Head Coal Company, as to the truth or falsity of which the plaintiff, J. W. Pellio, by reason of his relations to the company did not know or was not bound to know.

Answer: Refused. It is not a request for a finding of fact.

10. After the death of Charles A. Burr in June, 1904, the remaining directors, among whom was the plaintiff, J. W. Pellio, suffered and allowed David J. Whiteford to control and manage the business at the plant, up and until the time of August 17, 1906, when the plaintiff sold his stock. During that time there was no offer or attempt on the part of the plaintiff to bring about a meeting of the directors or of the stockholders or the electioo of a president for the company.

Answer. See the answer to the fifth request.

11. That on July 20, 1906, if not before, the plaintiff knew of the payment of the alleged salaries of Charles A. Burr, Mrs. Burr and David J. Whiteford by reason of the testimony offered upon that date in the hearing of an action brought by E. F. Marsh to cancel an assignment of his stock to D. J. Whiteford, and that an

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examination of the books of the company for a period of at least two years prior to that time would have disclosed that fact, and the further fact that there was a large surplus in the treasury of the company.

Answer. The facts are not correctly stated in this request. The hearing in the Marsh case was in October, 1906. Pellio, the plaintiff in the present case, when he heard the facts disclosed in the Marsh hearing, proceeded to assert his claim and employed Mr. Hannah as his attorney. Mr. Hannah was in poor health. This occasioned some delay. It is true that Pellio did not tender the money for the stock until March, 1907. The delay was not unreasonable under the circumstances. It is also true that an examination of the books would have disclosed the illegal payment of salaries for the years 1904-5-6; but the efforts of the plaintiff, informal as they were, met with no encouragement on the part of Whiteford.

12. That on the 17th day of August, 1906, when the plaintiff assigned his certificate of stock in blank and handed it to David J. Whiteford, he received therefor a check of the Bull's Head Coal Company in the sum of $1,000 drawn by David J. Whiteford, treasurer, and having printed across its face the words, "Bull's Head Coal Company"; that there having been neither a meeting of the directors nor of the stockholders of the said company for the period of time elapsing between January 13, 1905, and the above date, he knew as a director of the company that D. J. Whiteford was not expressly authorized by the company to purchase the stock of the company, and that he then knew for the same reason that D. J. Whiteford was not authorized to use the moneys of the company, as the treasurer thereof, for any such purpose.

Answer: The first part of this request is correct. The money paid for the stock was the money of the corporation. As to plaintiff's actual knowledge of the affairs of the company, it is safe to say he had none. As to what he should have known as director—that is a legal question.

13. That on the 7th of November, 1906, for the purpose of obtaining a controlling interest in the plant, as represented by the

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outstanding stock, David Spruks purchased five shares thereof of E. F. Marsh, the 100 shares thereof of the Burr estate, and on November 5, 1906, the five shares of the Brown estate. He paid for all this stock the sum of $19,550. As at that time the company was practically without organization, he could only obtain the assignments of their certificates, as evidence of his rights as a stockholder. He did not obtain his certificate when certificates were issued to the other stockholders, until after the necessary reorganization of the company, the election of officers and the adoption of by-laws.

Answer: I find as requested. Spruks bought a controlling interest in the company in November, 1906, although no certificates of stock were issued or transferred until June, 1907. He did not buy the Pellio stock. That was in the treasury of the company, marked "cancelled."

14. That David Spruks at the time he invested his money in the purchase of the stock of E. F. Marsh, the Ira T. Brown estate and the Burr estate in November, 1906, did it in good faith and had no knowledge of any intention on the part of the plaintiff in this case to question the validity of the transaction through and by which the certificate of stock held by the plaintiff passed in actual possession and control of the company. At that time the certificate of stock was pasted in the stock book of the company, the power of attorney printed on the back thereof regularly signed by this plaintiff and upon its face it was marked "cancelled."

Answer: I find as requested, although I do not consider that the rights of the plaintiff are affected by the advent of Spruks into the company.

15. That a meeting of the stockholders was held on November 12, 1906, and the company completely reorganized by the election of the proper officers and the adoption of by-laws. D. J. Whiteford has since sold out all his interest in the company as represented by his stock. Others have become interested as stockholders in the enterprise, and the moneys accumulated in the treasury have been paid out regularly in the form of dividends to the stockholders of the company.

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Answer: I find as requested except that the only reference I find to the payment of dividends is in the testimony of Spruks, who says that the $13,000 in bank in August, 1906, had been divided since he came into the company.

REQUESTS FOR FINDINGS OF FACT PRESENTED BY MR. BURNS FOR DEFENDANTS.

1. There is no evidence of false representations by the defendant company, or by anyone having power to bind it.

Answer: Refused.

2. Plaintiff was one of the directors of defendant corporation and as such was one of its trustees and bound to know its condition and undertakings.

Answer: This is a conclusion of law. The principle that a director is a trustee is a well settled proposition of law; but it has no application in this case.

3. It was his right and duty to fully acquaint himself with the affairs of the company and cannot take advantage of his own negligence.

Answer: This request presents a conclusion of law. I do not consider it applicable under the facts of the present case.

4. Plaintiff and W. J. Whiteford were co-directors and equally bound to labor for the interest of the company. They owed no duty to each other.

Answer: The reference is probably to David J. Whiteford. The request is not material because the plaintiff's stock was bought by the company and not by Whiteford. There can be no decree entered in this case against Whiteford.

PLAINTIFF'S REQUEST FOR CONCLUSIONS OF LAW.

1. The plaintiff is entitled to have his assignment of stock cancelled, and the five shares of stock restored to him.

Answer: Affirmed.

2. The plaintiff's right of action in this case is several to himself, and does not involve the interest of others, except so far as to have an accounting for the misappropriation of funds by the officers of the company.

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Answer. The first part of this request is affirmed. The question of an accounting cannot arise in this case.

3. The plaintiff is entitled to an account from those who have misappropriated the funds of the defendant company, and to such order of court as will give full relief, under the prayer for general relief.

Answer. Refused.

4. In a suit by a stockholder against the company, involving a breach of trust of the directors, it is not necessary to demand that the corporation proceed by action to recover the moneys misappropriated when, as in this case, the holders of the majority of the stock and officers of the company are guilty of the misappropriation.

Answer: Refused as inapplicable to this case.

5. It is not necessary to sue in equity all of the tort feasors. In equity, as at law, such an action is joint or several. The court may, however, require, in its discretion, all parties to be brought in.

Answer: Refused for the same reason.

6. The defendant, D. J. Whiteford, is liable in his individual capacity for all losses sustained by the plaintiff by reason of his misappropriation, and all misappropriation in which he was an active party.

Answer: Refused.

DEFENDANTS' REQUESTS FOR CONCLUSIONS OF LAW SUBMITTED BY MR. COMEGYS.

1. The plaintiff is not entitled to have his assignment of stock cancelled and the five shares of stock restored to him.

Answer: Refused.

2. The bill of complaint filed on behalf of the plaintiff is without equity and should be dismissed.

Answer: Refused.

DEFENDANTS' REQUESTS FOR CONCLUSIONS OF LAW SUBMITTED BY MR. BURNS.

1. Plaintiff has no standing to maintain an action against defendant company for matters concerning the company's affairs while he was one of its directors.

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Answer: Refused.

2. The fixing of salaries, declaring of dividends and adding to the surplus of a corporation, are entirely within the province of the board of directors, and a director who stands by without objection while these things are being done cannot be heard to complain.

Answer: Refused because inapplicable under the facts of this case.

3. A single stockholder cannot ask for an accounting by the corporation to himself alone. If the corporation has forfeited its charter or became insolvent an accounting must be for the benefit of all the stockholders.

Answer: Affirmed.

3. Under the facts and the law the plaintiff has no standing to maintain this action and his bill should be dismissed.

Answer: Refused.

DECREE NISI.

This cause came on to be heard at a regular term of equity court, and was argued by counsel, and upon consideration thereof, it is ordered, adjudged and decreed as follows:

1. The Bull's Head Coal Company, defendant, through its proper officers, is hereby directed and commanded to transfer and re-assign, or issue to John W. Pellio, the plaintiff, the five shares of the capital stock of said company, assigned or surrendered to the said company by the plaintiff on August 17, 1906, on the payment by the plaintiff to the said company of the sum of one thousand dollars with interest from August 17, 1906, to March 18, 1907.

2. An injunction is awarded against the Bull's Head Coal Company restraining the said company and its officers from selling, transferring, assigning or issuing the five shares of stock aforesaid to any other person than the plaintiff.

3. The Bull's Head Coal Company, defendant, is directed to pay the costs of these proceedings.

The prothonotary is directed to enter the foregoing decree nisi. Exceptions to the findings of fact and law and to the decree to be filed sec. reg.

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In the Court of Oyer and Terminer of Lackawanna County, No. 19, October Term, 1907.

MOTION FOR A NEW TRIAL.

Commonwealth vs. Carl Howe.

It is the undoubted right of counsel to entertain the opinion that a judge ought not to participate in the trial.

Where counsel's client had misgivings that a judge was incapable of giving him a fair trial, such misgivings ought to suggest to counsel the propriety of disclosing the same to the judge at an opportune time and in confidence.

Such misgivings were disclosed by counsel at the bar of the court after the case was called for trial and the selection of a jury had been directed to proceed.

Held: Whether such action was "with all good fidelity as well to the court as to the client," was not so free from doubt as could be desired.

The relation between an attorney and the court is pre-eminently one calling for mutual confidence and respect.

Testimony going to show bad reputation of a prosecutrix is admissible when it ante-dates the period covered by the indictment.

Where there is positive evidence of guilt of a character that doesn't admit of a reasonable doubt, proof of a previous good reputation no matter how well established, would not be sufficient to raise the doubt. To be of any avail the previous good reputation must be established as a fact and it must be proved to the satisfaction of the jury.

Messrs. Joseph O'Brien, District Attorney, and Clarence Balentine, for commonwealth.

Messrs. R. H. Holgate and Taylor & Lewis, for defendant.

Opinion by Newcomb, A. L. J.

April 15, 1908.

Of the twenty-six reasons filed three only were pressed at the argument. One of these is the first. So far as we are aware it is without precedent. We have asked in vain that at least some line of reasoning be suggested in its support. Counsel admits his inability to refer to anything in the nature of authority. He came into the case after the first trial. It had at that time been listed, called and tried in the order that the district attorney saw fit. That was in accordance with his official discretion and the uniform rule. The court never interferes with the district attorney's functions in that regard. It devolved upon the writer to preside at that trial according to the regular schedule of assignments. Counsel, then engaged, intimated no objection to the court and the trial proceed-

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ed. Long before the case was again put on the list the present counsel had assumed charge of the defense. It was at the head of the list and called for trial the second time before the judge who had first tried it. That was in conformity with the prevailing practice in criminal trials in this court.

It was the undoubted right of counsel to entertain the opinion that one of the judges ought not to participate in the trial. But the relation between the attorney and the court is preeminently one calling for mutual confidence and respect. That ought to have suggested to counsel the propriety of disclosing his misgivings at an opportune time in confidence to the judge. This he did not do. On the contrary, the first intimation of what was in his mind was at the bar of the court after the case was called for the second trial and the selection of a jury had been directed to proceed. He then interrupted the proceedings to read at length a petition, verified by his client's affidavit, to the effect that for the reasons therein stated the writer was incapable of giving him a fair trial.

Whether this was "with all good fidelity as well to the court as to the client" is not so free from doubt as could be desired. To assume that counsel regarded the petition as sufficient in law to support his motion might in a sense cast an unfavorable reflection upon his professional learning. We are reluctant to take a position involving that possible injustice to any member of the bar, more especially one of his years. True, in avoiding that assumption, the alternative conclusion may be that the only object aimed at was merely bizarre and spectacular effect, or the ill-advised gratification of a propensity for impugning other people's motives. If so the question of ethics must be settled by him in the forum of his conscience in accordance with his own standards.

No self-respecting man would willingly sit in judgment on any cause where it had been properly brought to his notice that either party believed him unable to perform his duties fairly and impartially. For obvious reasons it is equally true that he couldn't, and unless he was a nerveless invertebrate, he wouldn't, suffer himself to be publicly browbeaten from the bench at the moment of trial by the uncouth and offensive ostentation to which resort was had here, and in which counsel saw fit to persist at the more

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recent argument of this motion for a new trial.

It is further contended that it was error to strike out the testimony of defendant's witnesses, H. B. Osterhout and T. C. Carpenter as to the bad repute of the girl alleged to be the subject of the offense charged. The unlawful relations were claimed to have begun in May, 1905. The statute of limitations intervened September 9, 1905. The first impression was, and in fact still is, that defendant was bound to prove bad repute prior to May, that year. But in the end he was allowed to show her repute prior to the bar of the statute. Reference to the examination of Osterhout shows that by an offer counsel undertook to prove the girl's bad reputation from the speech of people prior to the time of her alleged relations with defendant. What he did in fact show was that the witness first became acquainted with the girl some time in September, 1905, when she began attending the Dalton High school. His acquaintance continued there until he left school sometime in 1906. To the general question as to her reputation, "where you were acquainted with her, for chastity," he answered "bad." It seems to us that a motion then and there to strike out the testimony could have been properly entertained. It failed to show any acquaintance with the girl's reputation prior to the time covered by the indictment. But no motion was made until it was further shown affirmatively on cross-examination that the witness never heard anything one way or the other prior to September, 1905. That, too, was coupled with his answer to the question. "Did you ever hear anything about her one way or the other prior to the time when the news of this affair got out; before that?" Answer: "No, I don't think I did." No wjust when "the news of the affair got out" appeared only inferentially, but taken altogether there can be no question that the witness did not qualify himself to speak of the girl's reputation at any time within which it was relevant.

The same is substantially true as to the testimony of the witness Carpenter. The question in chief as framed by counsel referred to the reputation from the general speech of people in the village where the girl lived prior to September 9, 1905. He answered that it was bad. If he had stuck to that it would have been competent. But he didn't. On cross-examination he distinctly

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qualified it and said repeatedly that he didn't hear anything on the subject until 1906. A motion being made to strike out his testimony and no attempt being made to further qualify the witness the motion was allowed. But that is not all with regard to this witness. It was reputation from the general speech of the people that counsel was seeking to prove. The whole testimony of the witness in my judgment failed to qualify him to speak as to that regardless of the period of time.

It is believed that the proper test of the validity of the ruling in this particular is, whether the evidence would have been sufficient to sustain the affirmative of the issue where the sole question on trial was one of bad repute prior to a given time. Clearly in such case it would be trifling with the subject and contrary to all analogy to permit the question to go to the jury on such evidence.

The only other matter pressed for consideration is that raised by the nineteenth reason. This complains that it was error to say to the jury, "Where there is positive evidence of guilt of a character that doesn't admit of a reasonable doubt, then, of course, proof of a previous good reputation no matter how well established would not be sufficient to raise a doubt." This is a detached extract from what was said in the charge on that subject. In itself as an abstract proposition it cannot be logically untrue. Counsel contends that it offends against the doctrine as stated by the Superior Court at a recent date in reviewing the former trial of this case. If so, we misunderstand the reasoning of the court in that instance, It is not apparent that it could have been misleading as tending to withdraw the evidence of defendant's reputation from proper consideration. For almost immediately before that, and as applicable to this case in the concrete, reference was made to the evidence of his reputation as evidence which he was entitled to have considered. The extract complained of is equally entitled to be considered with its context. Counsel's attention has been called to the form of his third point as suggesting occasion for some qualification. He chose to stand on it as drawn. The point, answer and context are as follows:

"3. Evidence of good reputation alone is sufficient, if believed, to raise a reasonable doubt.

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"Answer of the Court: As drawn that compels me to say as a matter of law the evidence of good reputation would create a reasonable doubt. The effect of the instruction asked for is misleading. It asks me to say that if there be proof of previous good reputation in this case on behalf of the defendant, then he should be acquitted because of a reasonable doubt. That I cannot say to you. It isn't the law. The evidence of good reputation alone, if believed, may create a reasonable doubt, but it is for the jury to say whether it does or does not; it is not for the court to say that it is sufficient to raise a reasonable doubt, except in the sense that it is sufficient for the jury to act upon, and, if they believe it, may of itself induce a reasonable doubt.

"That serves to call attention to some testimony on behalf of the defendant. He called some witnesses who testified substantially that prior to the time of this charge the defendant had borne a good reputation for chastity in the community where he lives, and he is entitled to have that considered. What its weight shall be, what effect it shall have, is wholly for you. As I have tried to suggest to you just now there are cases in which the proof of good character would be sufficient in itself to create a reasonable doubt. Where there is positive evidence of guilt of a character that doesn't admit of a reasonable doubt, then, of course, proof of a previous good reputation, no matter how well established, would not be sufficient to raise the doubt. To be of any avail the previous good reputation must be established as a fact, it must be proven to the satisfaction of the jury, and it is for you to say whether the evidence is satisfactory on that point or not. If on the whole evidence the defendant's reputation was doubtful, then he would not have established it and it wouldn't be for your consideration at all. It is only in case he has established a previous good reputation that you have to consider it. If that is established then it is for you to say what effect shall be given it and for you to say whether it creates a reasonable doubt in this case."

If that be error then the function of a defendant's reputation once proved must be purely a matter of law, uniform in its operation and effect; not a matter of fact for the consideration of a jury on its merits like other facts as applied to each particular case.

The defendant here has been twice convicted. In reality the question of his guilt was one of veracity as between him and the girl. The case is believed to have been fairly tried and submitted. No sufficient reason for a re-trial is made to appear and the motion is therefore denied.

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In the Court of Common Pleas of Lackawanna County, No. 671, March Term, 1906.

RULE FOR JUDGMENT NON OBSTANTE, ETC.

Pennsylvania Coal Company vs. Dunmore Borough School District.

Pending an appeal to the Common Pleas from the triennial assessment of 1904 on its property in Dunmore as adjusted by the county commissioners, plaintiff without any actual compulsion paid to the collector all its taxes according to the face of the assessment in order to get the benefit of the discount.

The adjudication of the court reduced plaintiff's assessment. Plaintiff then demanded the amount of the reduction from the school district. The demand was refused. Plaintiff then brought action. The claim was resisted on the theory that the case was governed by the common law rule relating to voluntary payment where neither fraud nor mistake was involved.

The contention was that to entitle one who has paid taxes illegally assessed to recover back the amount, the payment must have been made under actual compulsion by force of process available for instant seizure of person or property.

Held: The proviso of the act of 19th April, 1889, P. L. 37, relating to appeals from tax assessments, removes the case from the operation of the rule contended for.

Messrs. Willard, Warren and Knapp, for plaintiff.

Mr. R. J. Murray, for defendant.

Opinion by Newcomb, A. L. J.

March 16, 1908.

This action is assumpsit for an excess of school taxes paid by plaintiff to defendant for the year 1904. It was agreed at the trial that there was no question of fact for the jury and binding instructions were thereupon given for plaintiff subject to the general reservation whether there was any evidence to warrant a recovery. Upon that reservation this motion is founded.

The sole question in the case is whether the circumstances under which payment was made bring it within the proviso of the act of 19th April, 1889, P. L. 37, relating to appeals from tax assessments. Under this statute the plaintiff company had taken an appeal to the Common Pleas from the triennial assessment of 1904, on its property in Dunmore as adjusted by the county commissioners. The appeal came to trial September 26th that year. Owing to the fact that a considerable number of appeals of like character from various parts of the county were then pending their disposition was delayed until all could be heard. Adjudications were not filed until December 19th. In the meantime, on October 1, the duplicates and warrants were issued to the collectors. In this case the collector on the same day posted the usual notices demanding

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payment and stating among other things that the sixty days allowed by law for rebate would expire November 29th. On or about November 29th. On or about November 25th, without any actual compulsion, the plaintiff paid to the collector all its taxes according to the face of the assessment in order to get the benefit of the discount. The school taxes were paid over by the collector to the treasurer of the district. The adjudication of the court, filed December 19th, reduced plaintiff's assessment. The reduction on its school taxes amounted to $385.04. No further appeal being taken the adjudication became final, and plaintiff's demand on the school district for return of that amount being refused this action was brought.

The claim is resisted on the theory that the case is governed by the common law rule relating to voluntary payments where neither fraud nor mistake is involved. The contention is that to entitle one who has paid taxes illegally assessed to recover back the amount, the payment must have been made under actual compulsion by force of process available for instant seizure of person or property.

As applied to the cases cited in its support this doctrine is well understood. Good examples of these are

Peebles vs. Pittsburgh, 101 Pa., 304.

And Schoenfield vs. Bradford, 16 Sup. Ct., 165.

Were it not for the act of 1889 they would be decisive against the plaintiff here. But unless we mistake the meaning of that it removes the case from the operation of the rule contended for. Within the scope of the rule the right of recovery springs from actual duress. As we understand the statute the right depends upon the mere fact of payment pending an appeal to the court, and the ultimate result of the appeal favorable to the appellant. If that be sound the question whether payment was actually enforced or not is quite irrelevant.

Reference is made to some discussion of the act by Judge Beitler in Chew, et al. vs. Phila., 14 D. R., 168. This is relied upon as giving the act an interpretation in respect to voluntary payment, and holding that as to such payment of taxes there is nothing in the

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act to affect the common law status of the parties. We do not so understand the discussion.

The case presented but two questions: 1. Whether the appellants had any right to appeal to the Common Pleas after having paid the taxes while their primary appeal was pending before the Board of Revision; 2. Whether the local act of 1836 relating to appeals in Philadelphia had been repealed by the general act of 1889.

Both questions were decided against the appellants. What was said on the subject of voluntary payment must be considered as having reference only to payment under the circumstances of that case. Even then the character and effect of the payment were only drawn in question as bearing upon the right of appeal thereafter from the board of revision. The point upon which the case here turns was not, and indeed could not be, raised in that proceeding. Hence, we think it would be erroneous to understand the learned judge as expressing an opinion upon it. But if so it would have to be regarded as purely **obiter**.

True, he said the act of 1889 is silent as to the effect of a voluntary payment pending an appeal to the court as well as while the board of revision has the case under advisement. To this he added: "We can see nothing in the case before us to relieve the owners of the property from the rule of law that money voluntarily paid cannot be recovered."

That may well be true as regards payment before appeal is taken to the court, which was the fact in that instance. It would also seem to be true that there was nothing from which an appeal would then lie; and that was all that had to be decided on the subject of payment. The act of 1889 makes no reference to such case. It deals only with payment after appeal to the Common Pleas.

It confers the right of appeal from the decision of the county commissioners or Board of Revision to the Common Pleas; prescribes the time and manner of taking the appeal and bringing it to hearing; defines the powers of the court in the premises, and makes this proviso: "Provided, however, that the said appeal shall

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not prevent the collection of the taxes complained of, but in case the same shall be reduced the excess shall be returned to the person or persons who shall have paid the same."

Now the fatal weakness of defendant's position seems to be this, that no statute was needed to entitle the taxpayer to recover moneys wrongfully levied for taxes if paid under duress. For that is the condition upon which recovery could be had without the statutory provision for repayment, if the assessment were afterwards set aside wholly or in part. The cases upon which defendant relies gives full recognition to that right.

The statute doesn't say that "in case the same shall be reduced the excess shall be repaid to the person or persons who shall have been compelled to pay the same"; nor even "the persons from whom the same shall have been collected"; but to those "who shall have paid the same."

The true interpretation of the clause is believed to be that it defines the respective rights and duties of the parties in case of appeal. The appeal is not to operate as a supersedeas; the appellant's duty is to pay the amount as assessed; both parties are to abide the event of the appeal; and if in the end there be a reduction it is decisive of the appellant's right to have the excess refunded.

We cannot find that this provision of the statute has ever been directly before either the lower or appellate courts. But in Rockhill I. & C. Co. vs. Fulton County, 204 Pa., 44, the general effect of the act was discussed in passing upon the right of appeal and the powers and duty of the court in cases arising under it. In that connection the supreme court said: * * * "the imperative necessity for prompt payment given the complaining taxpayer but one remedy, and that is through appeal to the courts from the assessment or valuation; the very law which gives the appeal directs immediate payment, and then refunding of the excess collected if the appeal be successful. He cannot resist, or delay by litigation, the tax collector who attempts to levy what the taxpayer thinks an unjust tax."

While not directly in point as regards the question before us these observations would seem to throw some light on it as favoring the conclusion that the right to have the excess refunded where

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the right of appeal has been successfully exercised, is distinctly given by the statute; that it is made correlative to the duty of immediate payment; and is not contingent upon any question of actual duress.

The verdict is, therefore, believed to have been fully warranted.

The rule for judgment **non obstante** is discharged and judgment is directed to be entered on the verdict for plaintiff **sec leg.**

Attorneys employed by the next friend of an infant to bring an action on his behalf are held, in Wood v. Claiborne (Ark.) 11 L.R.A. (N.S) 913, not to be justified in paying the amount recovered over to the next friend, where, under the statute, any one may bring suit as next friend without giving bond.

A restriction that a note and trust deed executed for another's accommodation is to be used only as collateral to a note held by a particular bank is held, in Naef v. Potter (Ill.) 11 L.R.A. (N.S) 1034, not to be binding on one who, without notice, takes the instruments, even after maturity, to secure money loaned to take up the secured note.

The unjustifiable killing, by an officer, of a person whom he has arrested, is held, in Growbarger v. United States Fidelity & G. Co. (Ky.) 11 L.R.A. (N.S.) 758, to be within the provision of his bond by which the surety undertakes that he shall well and truly discharge all the duties of his office.

The extension of the footing or foundation of a wall erected by a property owner upon his own property, 6 inches over onto that of his neighbor, is held, in Trulock v. Parse (Ark.) 11 L.R.A. (N.S) 924, not to make the wall a party wall, where it is not shown to interfere with the use by the neighbor of his property.

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In the Court of Common Pleas of Lackawanna County, No. 8, September Term, 1905.

EQUITY.

Helen M. Fuller vs. Charlotte Fisk.

The use of a lake by so-called shore owners, for boating, cutting ice, washing sheep and occasionally drawing logs across the lake on the ice, gives no title whatever to a defendant by prescription.

Where the title to a lake is exclusively private, so that the public have no right therein, equity will grant relief to the owner from the acts of parties in renting boats and fishing tackle, to be used on the waters thereon, where numerous such acts have been committed and their continuance threatened, and where the injury resulting from each separate act would be trifling in amount as compared with the expenses of prosecuting actions at law to recover damages therefor.

Equity may be at once resorted to for appropriate relief when numerous acts of trespass are being committed and their continuance threatened under claim of right and when the injury arising from such acts is trifling, and the damages recoverable therefrom inadequate, as compared with the expense necessary to prosecute separate actions at law therefor.

Messrs. Willard, Warren & Knapp and Messrs. Welles & Torrey for plain iff.

Messrs. Agib Ricketts, George S. Horn, J. W. Carpenter and Fred. C. Hanyen, for defendant.

Opinion by Edwards, P. J., March 30, 1908.

This case has already been fully heard by us on the rule to show cause why a preliminary injunction should not be allowed. Findings of fact and law were made to the same extent as if the case had been before us on final hearing. Indeed, the evidence taken at the first hearing has been offered at the final hearing. There was some supplementary testimony taken at the trial, but it is cumulative in character; so that the case is now before us in the same way as it was at the preliminary hearing. Our findings of fact and law and our discussion of the case are reported in Fuller vs. Fisk, et al., 8 Lack. Jurist, 273, and the opinion is on file in the number of the present case.

We do not deem it necessary to repeat what we have already said, it being a part of the record now before us. We adopt and affirm the findings of fact and law filed in this case August 12, 1907.

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Although not in a technical sense, it may be said that the questions raised in the case at bar are **res adjudicata**. We refer to the case of Fuller vs. Cole, 33 Sup. Ct. Rep., 563. In both cases the title of the plaintiff is the same, and the defense in each case is the same. We can find no difference whatever in the nature of the controversy in the two cases.

After the final hearing, counsel on both sides submitted to us requests for findings of fact and law. The answer to these requests may be considered as meeting the requirement of the equity rules as to the duty of the trial judge to make specific findings.

PLAINTIFF'S REQUESTS FOR FINDINGS OF FACT.

These requests are ten in number. We find the facts as requested in each one of the requests. They are as follows:

1. That the plaintiff's title to the land in question is founded upon the following warrants, deeds and wills:

(a) Warrant of survey, issued to Moses Starr, April 3, 1792, with the return of survey dated March 27, 1815, with draft attached.

(b) Warrant of survey, issued to Samuel Giffen, April 3, 1792, with return of survey dated the 11th day of October, 1792.

(c) Patent Commonwealth of Pennsylvania, to John Reed and James Gibson, executors in trust for the use of the heirs of George Clymer, deceased, and Samuel Meredith, dated May 1, 1815. The patent includes land described in the warrant to Moses Starr.

(d) Patent Commonwealth of Pennsylvania to John Reed and James Gibson, executors in trust for the use of the heirs of George Clymer, deceased, and Samuel Meredith.

(e) Will of Samuel Meredith, dated 2d day of July, 1781, probated at Philadelphia, 27th of May, 1817.

(f) Will of Margaret Meredith, dated 9th of May, 1817, probated in Wayne County, August 6, 1821.

(g) Will of Margaret Meredith, dated 29th of January, 1822, probated at Trenton, N. J., November 28, 1826.

(h) Will of Elizabeth Meredith, dated 29th of January, 1822, probated at Hunterdon County, N. J., 28th of November, 1826.

(i) Deed, Samuel Dickinson and Ann, his wife, Thomas Meredith and Sarah, his wife, John M. Reed, Margaret M. Reed and

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John Reed, guardians for Margaret M. Reed, to Maria Meredith, dated November 25, 1826, recorded in Lackawanna County, in deed book 216, page 1.

(j) Deed, Thomas Meredith and Sarah, his wife, Samuel Dickinson and Ann, his wife, Maria Meredith, John Reed, John M. Reed, Henry M. Reed and Margaret M. Reed, children of John Reed, and Martha Reed, to Henry Clymer, George Clymer, John Reed and James Gibson, dated December 21, 1827, recorded in Luzerne County, deed book 27, page 197.

(k) Will of George Clymer, dated 18th of January, 1813. Codicil dated January 22, 1813, probated at Philadelphia, January 30, 1813.

(l) Deed, John Reed and James Gibson to George Clymer, dated March 29, 1831, recorded in Luzerne County, in deed book 28, page 11.

(m) Will of Henry Clymer, dated the 15th day of April, 1830, probated in Bucks County, Pennsylvania, May 1, 1830.

(n) Bond and inventory, filed in the estate of George Clymer, deceased, dated the 22nd of September, 1848.

(o) Deed, George McCall to Margaret A. McCall, Hannah McCall and Catherine McCall, dated the 18th day of January, 1833, recorded in Luzerne County, deed book 39, page 231.

(p) Will of William Coleman McCall, dated the 8th of July, 1831, probated in Philadelphia County, November 24, 1831.

(q) Exemplification of the record of the clerk of the orphans' court, County of Philadelphia, in the account of John Reed and James Gibson, executors of George Clymer, deceased.

(r) Will of Mary Clymer, dated July 17, 1843, with codicil dated July 21, 1847, probated in Bucks County, November 23, 1853.

(s) Margaret A. McCall and Catherine McCall to George C. McCall, dated January 17, 1854, recorded in Luzerne County, deed book 74, page 513.

(t) Will of Harriet McCall, dated July 21, 1843, probated at Philadelphia, September 7, 1847.

(u) Will of Mary McCall, dated December 6, 1861, probated in Mercer County, N. J., July 15, 1863.

(v) Will of William C. McCall, dated May 24, 1865, probated

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in Mercer County, N. J., April 4, 1868.

(w) Deed, Mary Overton and Eliza, his wife, William B. Clymer and Mary, his wife, George Clymer and Mary, his wife, Francis Clymer and Mary Willing Clymer, to Thomas Willing Clymer, dated October 1, 1858, recorded in Luzerne County in Deed Book No. 74, page 519.

(x) Deed, Meredith Clymer to Thomas V. Clymer, dated December 11, 1858, recorded in Luzerne County, March 15, 1851, deed book No. 74, page 522.

(y) Deed, George Clymer McCall to John C. Adams and Job Rerby, dated 8th of March, 1854, recorded in Luzerne County, deed book 74, page 513.

(a-2) Will of Robert McCall, dated 1850, probated the 30th day of September, 1854, in Philadelphia County.

(b-2) Deed, John C. Adams and Job P. Rerby, to Michael Mylert, dated May 8, 1854, recorded in Luzerne County, deed book 74, page 515

(c-2) Deed, Mary R. Fisher, Peter McCall and Jane, his wife, and Henry McCall, Jr., and Charlotte, his wife, to George Wansey and Thomas W. Clymer, dated January 10, 1858, recorded in Luzerne County, in deed book No. 74, page 516.

(d-2) Michael Meylert to George Wansey and Thomas W. Clymer, dated the 15th of September, 1857, recorded in Luzerne County, deed book 74, page 516.

(e-2) Deed, George Wansey to Thomas Willing Clymer, dated the 7th of October, 1858, recorded in Luzerne County, deed book 74, page 523.

(f-2) Will of Thomas W. Clymer, dated the 24th of June, 1869, probated in Mercer County, N. J., the 5th of February, 1872.

(g-2) Mary Clymer Grant and Gulleo Grant, and Rose Clymer, Countess Jacques de Bryas and Count Jacques de Bryas, to Edward L. Fuller, recorded in Lackawanna County, deed book 197, page 500.

(h-2) Deed, S. Meredith Dickinson and Garreta N. Dickinson, his wife, George F. Dickinson and Jane A. Dickinson, his wife, to E. L. Fuller, dated the 10th day of September, 1902, recorded in Lackawanna County, in deed book 199, page 20.

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(i-2) Deed, Edward L. Fuller to Helen M. Fuller, dated the 24th day of December, 1902, recorded in deed book 197, Lackawanna County, page 500.

(j-2) Will of Mary Willing Clymer, recorded in will book 21, page 150, in the register of wills' office, Lackawanna County, being exemplified copy of the last will of Margaret Willing Clymer, deceased, proved August 9, 1893.

2. That William B. Clymer died in Florence, Italy, in the year 1873, intestate.

3. That his wife and all his children, except Mary Clymer and Rose Clymer, perished in the English channel in November, 1878, and that the said Rose and Mary Clymer were the sole surviving heirs of William B. Clymer, deceased.

4. That on the 15th day of July, 1905, the defendant, Charlotte Fisk, was the owner of about one dozen boats, kept in the boat house on her own property, and from that boat house she rented boats, for the purpose of boating and fishing on said lake, to any parties that desired the same, and that the other defendants, Thomas Fisk and E. S. Fisk, were her sons and agents, and from time to time at various times from 1902, to the time of the institution of this suit, they let boats for boating, sailing, fishing and gathering lilies upon said lake.

5. That the said defendants, Thomas Fisk and E .S. Fisk, at divers times, from 1902, to the present time, went upon the surface of said lake when frozen, sawed and cut and took away ice from the said surface on various occasions.

6. That on or about the 21st day of June, 1905, the following notice was served upon each of the defendants.

To Charlotte Fisk, Thomas S. Fisk and Esdras Howell Fisk. You are hereby notified that Helen M. Fuller is the owner of a certain piece or parcel of land covered in part or in full by water, situate partly in the borough of Dalton and partly in the township of North Abington, in the County of Lackawanna and State of Pennsylvania, which said land is bounded and described as follows, to wit. Beginning at a post in the Wall pond or Lily lake, being a corner of land conveyed to Esek Franklin, and thence by said Franklin on edge of said pond, north 57 degrees west 31 perches to a cor-

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ner of land surveyed to Matthew Jackson; thence along said line on the edge of said pond north 75½ degrees west 82 perches; thence along a line of land surveyed to Charles Johnson, north 21 degrees west 92 perches to a post; thence by land surveyed to Anthony Franklin, south 53 degrees west 71.3 perches to a post in the swamp; thence south 54 degrees east 70 perches to a corner of George Dixon; thence by land surveyed to Thomas Wall, south 46 degrees east 46 perches to a post on the edge of said pond; thence by land surveyed to Lyman Dixon, south 83 degrees east 61 perches; south 79 degrees east 52 perches to land of Esek Franklin aforesaid; thence by the same north 18 perches to the place of beginning.

Upon this pond you have from time to time committed acts of trespass by renting boats to others to be used on said pond and by renting fishing tackle to be used in fishing in the waters of said pond. You have also committed acts of trespass by cutting and carrying away ice from the surface of said pond contrary to law. You have been frequently warned not to let or use boats upon the said waters. Still, you persisted in so doing; and you have also been warned and notified not to cut ice upon this pond. An action of trespass has been commenced against Thomas S. Fisk which you have appealed from the judgment of Myron Kasson, alderman, to the Court of Common Pleas of Lackawanna County. These acts of trespass you still persist in committing, and you are hereby notified that if, after the service of this notice upon you, you rent or allow your boats and fishing tackle to be used upon said waters of said lake, or if you cut ice from said pond or go upon said pond yourselves in boats proper action will be taken in the Court of Common Pleas of Lackawanna County to restrain you from continuing these repeated acts of trespass.

HELEN M. FULLER.
By Willard, Warren & Knapp, Her Attorneys.

June 21, 1905.

7. That from the time of the service of the said notice to the time that the preliminary injunction was granted in this case, the defendants have rented for hire to others boats for the purpose of boating and fishing on said lake, and have from time to time cut and

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carried away ice from the surface of said lake, and have openly declared their right so to do, and have admitted at the trial of this case that they have so used the said lake, and that they have given directions to persons, to whom they have let boats, to go wherever they saw fit on the lake, notwithstanding the protests and notice of the plaintiff, to fish, gather lilies and boat wherever they saw fit on said lake, and that the defendants, Thomas Fisk, and E. H. Fisk, have themselves used and sailed their boats, fished and cut ice, wherever they saw fit; and have continued these acts from the time of the service of said notice to the time of the granting of the injunction in this case.

8. That the defendants derived their title from Charles Johnson, who derived his title from a deed dated the 11th of July, 1828, from Samuel Dickinson, and others also deed of same date from Henry Clymer and others; recorded January 8, 1845, in Luzerne county, in deed book 41, page 225. The description in the deeds is as follows. "All that moiety of the following tract of land situate, lying and being in the township of Abington, in the county and state aforesaid, bounded as follows: Beginning at a post and stones the west corner of Turnpike lot No. 4, and at the east corner of land surveyed for George W. Browning; thence south 61½ degrees, west 98½ perches along said Browning's line to a post and stones, in the line of land surveyed to Anthony Franklin; thence south 46 degrees east 83 perches to a beech tree near the Wall pond, another corner of said Franklin survey; thence south 53 degrees west 2 perches to a post in the line of said Franklin survey; thence south 21 degrees, east 92 perches through a part of the north side of said pond to a corner in the pond; thence north 44 degrees east 133 perches to a post and stones in the northwest line of turnpike lot No. 3; thence north 46 degrees west 132 perches to the beginning, containing 99 acres and 30 perches strict measure, be the same more or less."

9. Upon the land in question, described in the plaintiff's bill as belonging to Helen M. Fuller, there were no improvements indicating a personal responsibility for its taxes until the year 1903, when Mrs. Fuller built her boat house upon the lake; nor was the

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land in question apparently in the possession of any one, nor was it improved by any one, until about the year 1903.

10. The survey made by George E. Stevenson definitely located the original Starr and Giffen warrants, and definitely established that the lake in question was within the lines of said warrants and never had been conveyed by the Clymers and Merediths to any other person until the conveyance of one-tenth thereof by S. Meredith Dickinson, and wife, and George P. Dickinson and wife, to E. L. Fuller; and nine-tenths thereof by the deed of Mary Clymer Grant and her husband and Rose Clymer de Bryas, to E. L. Fuller.

DEFENDANTS' REQUEST FOR FINDINGS OF FACT.

1. In the early part of the last century the families of George Clymer and Samuel Meredith owned large bodies of wild lands in Luzerne county, in the part now included in Lackawanna County. Among these were two tracts, one of which was surveyed upon a warrant to Samuel Griffen, and the other surveyed upon a warrant to Moses Starr. These warrants and surveys cover the land in question in this case. Patents were granted to John Read and James Gibson, executors, in trust for the use of the heirs of said George Clymer, deceased, and said Samuel Meredith.

Answer: We find as requested.

2. The returns of survey upon the said warrants locate these lands as "situate on the waters of Tunkhannock creek in the County of Luzerne." The waters of this creek at the place of said location, by reason of a depression in the land, expand into a pond or small lake, formerly known as Wall's pond, but later named Lily Lake.

Answer: We find as requested.

3. There are no other waters about or upon these lands except these waters of Tunkhannock creek; the initial headwaters of this creek being springs and small streams therefrom, upon said lands.

Answer: Found as requested.

4. Beginning with a deed to Anthony Franklin, dated January 1, 1820, and followed by deed to Charles Johnson, dated July 11, 1828, and deed to Thomas Wall, dated May 13, 1830, and deed to Matthew Jackson, dated August 20, 1832, and deed to William

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Smith and Charles B. Smith, dated September 24, 1836, and deed to Esek Franklin, dated June 23, 1838, and deed to Lyman Dixon, dated June 13, 1839, all the lands around the said pond or lake were conveyed by the said Clymer and Meredith families to the said several grantees named in said deeds.

Answer: Refused. Most of the conveyances mentioned in this request were excluded under objection.

5. In the aforesaid deed to Matthew Jackson, the boundary of the land conveyed to him, where it is contiguous to the said lake, is as follows, to wit: "to a corner in the edge of a small lake; thence along said lake, south 7½ degrees east 82 perches to a corner in the edge of said lake." This land thus bordering on the lake is in the central part of the lake, and thus makes the lake its boundary for over a quarter of a mile. Adjoining this is the land conveyed to Esek Franklin, and the description of the part contiguous to the lake in that is, "to a corner in the edge of Wall pond; thence along the edge of said pond south 57 degrees east 31 perches to a corner in the edge of said pond." This land extends around one end of the lake. Adjoining it is the land as aforesaid conveyed to Lyman Dixon, which is on the opposite side of the lake, being thus opposed partly to the land of said Esek Franklin and partly to that of said Matthew Jackson; the description in this deed is, "to the edge of Wall's pond; thence along the edge of said pond south 79 degrees west 52 perches." Again, adjoining this is the land as aforesaid, conveyed to Thomas Wall, which is opposite on the lake to that of Matthew Jackson aforesaid, and the description in which is "to a post in a lake; thence along the side of the same lake north 46 degrees west 46 perches to a post and stones."

Answer: Refused for the same reason.

6. In none of the aforesaid conveyances is there any exception of the said lake or any part thereof; nor is there any reservation of a right of way for ingress to or egress from the said lake.

Answer: Refused for the same reason.

7. In all the said conveyances there is an express conveyance of the waters as an appurtenance to the land.

Answer: Refused for the same reason.

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8. The right to use the water of the lake was a part of the inducement to purchase the land adjoining it, and at the time of taking the use and occupation of the lands the several grantees took at the same time the use and occupation of the pond. They used it in all respects as farmers usually use waters situate on or by their lands, they watered their cattle there, they washed their sheep, they at times did the family washing in it, they floated their timber upon and across it, they stocked it with fish and fished from it, they built boat houses and landings, and put their boats on it, and boated on it as they pleased, either for pleasure or business, in winter they cut and took their ice from it; in a word, whatever use they had for it, they exercised without question as to their rights so to do, and their descendants have continued such use down to the commencement of the present proceedings.

Answer. We find as requested so far as it relates to the use of the waters of the lake.

9. The husband of the defendent, Charlotte Fisk, and the father of the other defendants, having purchased the land originally sold to Charles Johnson aforesaid, built a boat house on the lake thirty years ago, and placed thereon in connection with said boat house a large number of boats, with which he and his family, the present defendants, have used and occupied the lake continuously and without question or objection by anyone ever since, down to the commencement of the present proceedings.

Answer. Found as requested.

10. After the sale of the last piece of land adjoining the lake, as aforesaid, to Lyman Dixon, in 1839, no entry upon, or claim of right to the lake or any part thereof, has at any time been in any way made by or in behalf of anyone of the Meredith or Clymer families, the aforesaid original owners.

Answer. Refused. We can find no affirmative evidence as to this point.

11. The claim of plaintiff is based upon a quit-claim deed from two women in Europe, one in France and the other in Italy, representing them to be heirs and legal representatives of one William Bingham Clymer, deceased, and that he acquired title to the

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land in question by virtue of the will of Thomas Willing Clymer, deceased.

Answer. Refused. The allegation in the request is only a part of the truth.

12. There is no evidence in the case, that the aforesaid pond, the land in question here, was devised by Thomas Willing Clymer to the said William Bingham Clymer.

Answer: Refused.

13. There is no legal evidence in the case that either of the aforesaid quitclaimers is the heir or legal representative of the said William Bingham Clymer, deceased.

Answer: Refused.

14. There is no evidence in the case that William Bingham Clymer ever owned any right or title to the said pond, the land in question, or that he ever in any way made any claim of such right or title.

Answer: Refused.

15. The said quitclaimers left this country and went to Europe, if they are the daughters of said William Bingham Clymer, in the year 1878, and never at any time since have returned to this country; and in all that time no entry upon or claim of right to the land in question, has been in any way made by them or either of them, or by anyone in this behalf, or that of either of them.

Answer: This is correct. We find as requested.

PLAINTIFF'S REQUESTS FOR CONCLUSIONS OF LAW.

1. That the warrants, patents, deeds and wills contained and mentioned in the first request for findings of fact, vested a good title in the plaintiff, to the lands described in the bill.

Answer: Affirmed.

2. That the use of the lake by the so-called shore owners, for boating, cutting ice, washing sheep and occasionally drawing logs across the lake on the ice, gave no title whatever to the defendant by prescription.

Answer: Affirmed.

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3. The question of jurisdiction in this case was fully settled by the court in disposing of the motion of defendants' counsel, which motion was as follows: "Now, September 11, 1905, motion is hereby filed for a dismissal of the bill of plaintiff because of want of jurisdiction in the court."

Answer: Refused.

4. Where the title to a lake is exclusively private, so that the public have no rights therein, equity will grant relief to the owners from the acts of parties in renting boats and fishing tackle, to be used on the waters thereon, where numerous such acts have been committed, and their continuance threatened, and where the injury resulting from each separate act would be trifling in amount as compared with tht expenses of prosecuting actions at law to recover damages therefor.

Answer: Affirmed.

5. Equity may be at once resorted to for appropriate relief when numerous acts of trespass are being committed and their continuance threatened under claim of right, and when the injury arising from such act is trifling, and the damages recoverable therefor inadequate as compared with the expense necesssary to prosecute separate actions at law therefor.

Answer: Affirmed.

6. The title established by the plaintiff to the land or lake in question is sufficient to support her bill filed in this case.

Answer: Affirmed.

7. Under all the evidence the plaintiff is entitled to the decree prayed for in her bill.

Answer: Affirmed.

DEFENDANTS' REQUESTS FOR CONCLUSIONS OF LAW.

1. The conveyance made by the Meredith and Clymer families to the several grantees of the lands situate on Lily lake or Wall's pond, the land in question in this case, conveyed to the grantees the right to use and occupy the waters of the said lake.

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Answer: Refused. The conveyance referred to in this request, excepting Charlotte Fisk's alleged title, are not in evidence.

2. The unquestioned and undisturbed use and occupation of the waters of the said pond by the said grantees, and their successors and descendants, continuously for not only twenty-one years, but for about three-fourths of a century, establishes the presumption of a grant of such use and occupation.

Answer: Refused.

3. The said continuous use and occupation by the grantees, and the continuous allowance of the same by the grantors, without objection or hindrance in any way, of the waters of the pond, from and after the several purchases of the land adjoining it, shows the contemporaneous exposition of the parties selling and purchasing, as to the intent and effect of the said sales and purchases.

Answer: Refused.

4. Even if the conveyances of the land did not fully show a conveyance of the right to the use of the waters of the pond, they would at least show a dedication of the pond to the use of the shore owners, which the said use and occupation by them would fully confirm.

Answer: Refused.

5. The plaintiff has shown in the evidence in this case neither title nor possession, nor right of possession to the land in question in the case. And has wholly failed to show any right whatever to the said land, or to maintain her bill.

Answer: Refused.

6. The case presented in the bill and also presented in the evidence is not within the jurisdiction of the court sitting in equity.

Answer: Refused.

7. The bill is obviously an ejectment bill, and the injunction granted in the case is plainly an ejectment by injunction; the injunction must therefore be dissolved, and the bill dismissed at the costs of the plaintiff.

Answer: Refused.

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DECREE NISI.

The prothonotary is directed to enter a decree nisi in accordance with the foregoing findings and to give notice thereof to the parties or their counsel. Exceptions to be filed sec. reg.

Counsel for plaintiff are to prepare decree in accordance with equity rule 84.

That it is not negligence *per se* to attempt to drive over a railroad 6crossing in front of an engine which is standing still with no sign or indication on the part of the engineer of intention to move it is held, in Atchison, T. & S. F. R. Co. v. Wilkie (Kan.) 11 L.R.A. (N.S.) 963.

A constable who, within his jurisdiction, arrests a person who has committed a felony, is held, in Somerset Bank v. Edmund (Ohio) 11 L.R.A. (N.S) 1170, to have no right, for the purpose of claiming a reward, to assert that the arrest made pursuant to official duty was made by him in his individual capacity as a private citizen.

The right of a taxpayer to maintain a suit against a county to recover taxes illegally and wrongfully exacted by the officers of the county after the taxes had been paid out by its disbursing officers is denied in Com. use of Devoe v. Boske (Ky.) 11 L.R.A. (N.S) 1104.

That two states dealing each with its own law of succession, both of which a devisee has invoked to secure his rights, tax the right which they respectively confer, is held, in Re Rogers (Mich.) 11 L.R.A (N.S.) 1134, to give no cause for complaint on constitutional grounds.

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In the Court of Common Pleas of Lackawanna County, No. 7, November Term, 1906.

IN EQUITY.

The Borough of Olyphant vs. The Delaware & Hudson Company.

Plaintiff prayed for an injunction to restrain defendant from closing an alleged public street, in a borough, by the erection of a fence.

Held: The plaintiff had the burden of showing such abandonment by the owner to public use as would show a clear intention to dedicate.

Where there is no evidence to warrant the conclusion that the land was ever dedicated to the public use by the defendant or any other owner, the right of private property can neither be divested nor impaired.

Where there is no evidence to warrant the conclusion of adverse user by the public of the alleged way across defendant's land for the period of twenty-one years or any other length of time, the evidence is insufficient to support the theory of prescriptive right in the public.

Mr. F. M. Lynch, Borough Solicitor, for plaintiff.

Messrs. Welles & Torrey, for defendant.

Opinion of Newcomb, A. L. J., April 9, 1908.

The prayer of the bill is for an injunction to restrain defendant from closing an alleged public street in the borough of Olyphant by the erection of a fence. From the pleadings, evidence and arguments of counsel I find the folowing

CONCLUSIONS OF FACT:

1. About 1895 or 1896 Mr. Blewitt, an engineer in the employ of the borough made a map of the borough for assessment purposes. In this map he plotted a street or way called in the bill New Street. So much thereof as is in question in this case was, according to the map, a mere alley about ten feet wide. The data from which the alley was plotted were found in an earlier map of what was called the Throop estate, or lands of Dr. B. H. Throop, now deceased. The borough map, so far as concerns this alley, was a tracing of the Dr. Throop map. The latter was made about 1894 by C. E. Milnes, a civil engineer from surveys of lands claimed by Throop. There was, however, no way or alley defined on the ground.

2. So far as appears in this case the only claim of title in Dr. Throop is as the sheriff's grantee of lands taken in execution as the lands of Abel Barker on a judgment transferred to this county from

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the Common Pleas of Luzerne County. It was filed here January 6, 1879, to No. 807, February Term, that year. The sale was held in May, 1883. The original judgment was entered in the other county to No. 11, November Term, 1883, but the date of entry doesn't appear. The deed to Throop is recorded in sheriff's deed book No. 1, at page 436.

3. For many years before the time of that sale the defendant was in the actual use and enjoyment of the land as part of a trust of two acres and a fraction to which it claimed title by deed from Abel Barker and others dated February 16, 1867, and recorded in the recorder's office of Luzerne County, April 9, 1880, in deed book No. 140, page 45. The tract was the site of one of defendant's coal operations. There was a mine opening and colliery on the premises. The boiler house and stack occupied part of the strip now alleged to be a public way. The waste discharged from the operation formed a large rock dump that covered a part of the strip. The tract was not enclosed and people having occasion to pass and repass in that direction travelled across the land at pleasure by the sufferance of defendant, but not in one definite course.

4. The alleged way runs from Gravity street eastward along the rear of the lots fronting northerly on Hill street. These are designated by the even numbers from 2 to 14 inclusive. The lots are rectangular in shape and each about 60 feet wide in rear. No. 2 at Gravity street is nearly fifteen feet shorter than the other six which are uniform in depth. The rear line of the first six lots forms the northerly boundary of the tract described in the defendant's deed from Barker and others. Hence it extends about 260 feet easterly from Gravity street to the corner of 12 and 14 with a square jag of nearly fifteen feet at the distance of about 60 feet. The boiler house and stack stood within less than 10 feet of the fence line of No. 2. The rock dump to the easterly extended to the fence. At an early day when mining operations were carried on there the fence on No. 2 had been removed near Gravity street so that by crossing the corner of that lot a wagon could be driven upon the defendant's premises at the rear of these properties. For the convenience of the owners of the lots there was some use of the

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land for that purpose, but it was only shared with the defendant who made use of it in that way. The easterly line of the tract claimed by the defendant under deed from Barker extends about 10 perches southerly from the rear corner of lots 12 and 14 and on the same course as their division line. In addition to these lots on the north, Throop claimed title to the lands adjoining the defendant on the easterly. The evidence suggests that he plotted his lands so as to show a street or lane running easterly from defendant's line.

5. About 1881 the breaker on this property was destroyed by fire. It was not rebuilt and active operations ceased. In the course of a year or two thereafter the remaining structures were removed and no particular use of the surface has since been made. It has in that way lain open as a common except a portion in the rear of lot 4 which defendant leased to a tenant for use in connection with that lot. The land so demised covers a section of the alleged public way. It was for a time enclosed by the tenant. Whether it continues to be enclosed at the present time is uncertain under the evidence. But it is used as a yard in connection with the tenant's livery business. The lease was made in 1901, and seems to be still in force. In 1899 a portion of the rock dump was cleared away. That was next to the fence line where the dump was shallowest. It was cleared to the width of 20-25 feet. Before that it was hardly passable. After that the surface was passable at that point for wagons, though by reason of its steepness and unimproved condition it was very ill-suited to travel by wagon. There was some driving there after that, though to what extent is not clear. So far as concerns the portion under lease the travel was by the sufferance of the tenant who had a barway there that drivers opened and closed as they occasionally passed up or down the hill.

6. The work of clearing away the rock was not at the instance of the defendant but at that of the agent of the Throop estate. No action has ever been taken by the proceedings in court or by the borough council to establish a way either public or private across the land in question. Neither was it ever opened by the defendant for use as a highway. Nothing in the way of improvement was ever done by the borough. So far as appears in the case the filing of this bill is the only

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thing ever done by the borough in the assertion of any control over the alleged way. What the relation of the other plaintiffs is to the subject matter of the suit does not appear by the evidence.

PLAINTIFF'S REQUESTS FOR CONCLUSIONS OF FACT.

1. That New street is a street in the borough of Olyphant, extending eastward from Gravity street to the old gravity railroad and beyond it to and through Fern Hill.

Answer: It is not so found.

2. That New street has been used by the general public since 1875 both as a footway and as a wagonway.

Answer: It is not so found.

3. That New street at no time since 1875. has been less than ten feet wide at any point.

Answer: It is not so found.

4. That New street is the main artery of travel between Fern Hill and the business portion of the town of Olyphant.

Answer: It is not so found.

5. That since the summer of 1883, the Delaware & Hudson Company has had no property, no breaker, shop, barn, store, house or any other structure in the vicinity of New street, and to which New street could have been utilized as a means of access.

Answer: It is so found so far as the request assumes the existence of a street at the disputed point. That assumption is not warranted by the evidence.

6. That in 1883, at a sheriff's sale, B. H. Throop bought a parcel of land, which included New street from Gravity street to the old gravity track.

Answer: It is so found only in the sense that the parcel covered what the plaintiff calls New street.

7. That the defendant never made any use of New street different in any respect from the use made of it by the general public.

Answer: It is not so found. This finding is made with reference

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to the land in question called "New street" by the plaintiff, without meaning to imply the existence of such street across the land.

8. That New street has been used by wagons, coal wagons, store wagons, baker wagons and butcher wagons, and has been travelled afoot by the general public.

Answer: Understanding this to mean that a defined way has been so used as a public way it is not so found.

9. That New street, at least that portion of it between Gravity street and the old gravity railroad, has been used by the general public for twenty-one years at least, adversely, exclusively and continuously.

Answer: It is not so found.

PLAINTIFF'S REQUEST FOR CONCLUSION OF LAW.

1. That New street was a public street of the borough of Olyphant at the time of the bringing of this suit, and that the defendant had no right to obstruct it in any way.

Answer: Refused.

CONCLUSIONS OF LAW.

1. There is no evidence to warrant the conclusion that the alleged street or way was ever established or opened by authority of law.

2. So far as concerns the theory that the street originated in a dedication by Throop it fails by reason of the failure to show title in him. His claim was by sheriff sale of Barker's title. But that title had been acquired by the defendant some years before the entry of judgment on which the sheriff afterwards sold to Throop.

3. There is no evidence to warrant the conclusion that the land was ever dedicated to the public by the defendant or any other owner.

4. There is no evidence to warrant the conclusion of adverse user by the public of the alleged way across defendant's land for the period of twenty-one years or any other length of time. Hence the evidence is insufficient to support the theory of a prescriptive right in the public.

5. The bill should be dismissed at the plaintiff's cost.

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DISCUSSION.

Nothing need be added to these conclusions. The case presents a simple question of fact. The plaintiff has the burden of showing such abandonment by the owner to public use as would show a clear intention to dedicate. In the end it becomes a question here whether there has been such user by the public as amounts to an established right in the nature of prescription. Down to 1881 the defendant was exercising an apparent right to dump the waste from its mining operations on a portion of the very land needed to make out the supposed street. That remained there until 1899. It is hard to think of anything more inconsistent with the theory of a public way. Manifestly the clearing away of the rock at that time, not by either of the parties or at their instance but at that of a stranger, was for the very purpose of making a passageway for wagons, where none had exised before. But even such passage didn't remain long uninterrupted. Another portion of the "way" was enclosed in 1901 by the defendant's lessee and has remained in her private use ever since, subject to what would appear to be a permissive use in common with her by persons occasionally going in that vicinity.

The right of private property can neither be divested nor impaired by such user as is shown here. If authority need by cited reference is made to the following:

Gowan vs. Phila. Exch. Co., 5 W. & S., 141.
Griffins Appeal, 109 Pa., 150.
Weiss vs. Boro., 139 Pa., 294.
Ferdinando vs. City, 190 Pa., 321.
Cotter et al. vs. City, 194 Pa., 496.
Bellefield Ave., 2 Sup. Ct., 146.

Let a decre *nisi* be entered that the bill be dismissed in accordance with the 5th conclusion of law, and exceptions, if any, be filed within ten days after notice *sec reg.*

April 9, 1908. BY THE COURT.

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In the Court of Common Pleas of Lackawanna County, No. 17, September Term, 1907.

IN EQUITY.

BILL FOR SPECIFIC PERFORMANCE OF CONTRACT.

Joseph Krajeski vs. Alexander Krzywicki et al.

A wife having never entered into an agreement to join her husband in conveying land, cannot be compelled to execute a deed therefor.

The plaintiff having paid the expense of drawing the deed before he knew that the wife would not sign it, should be allowed to deduct that sum from the purchase money due; he cannot, however, deduct such expense as incurred after he learned that the wife would not sign the deed; nor for the loss of the use of the money which he had ready to pay on the same principle. He is, however, entitled to deduct the interest on the money paid down for the reason that the defendant had the use of the money.

Messrs. M. J. & T. P. Donahoe, for plaintiff.

Messrs. P. E. Kilcullen and James F. Powell, for defendants.

Opinion by Carpenter, A. L. J. May 11, 1908.

The plaintiff filed his bill in this case averring that on August 26, 1907, he entered into a contract in writing with the defendant, Alexander Krzywicki, for the purchase of a land in the borough of Moosic for the price of $1,450, and paid down $750 of the purchase money; that Mary Krzywicki consented to the contract and verbally agreed to make the transfer of the property with her husband; that on August 29th plaintiff tendered the remainder of the purchase money and demanded a deed from the defendants, but they refused to accept the money and deliver a deed. The bill prayed that a decree be made directing the defendants to execute and deliver a deed to plaintiff.

From the bill, answer and proofs I find the following

FACTS:

1. Alexander Krzywicki was the owner and in possession of lot No. 11, in block No. 16, on Anthracite avenue in the borough of Moosic, and on August 26, 1907, he agreed to sell the said lot to Joseph Krajeski for the sum of $1,450. Krajeski then paid him $750 on account of the purchase money and received from him a writing of which the following is a copy:

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"Received, August 26, 1907, from Joseph Krajeski seven hundred and fifty dollars, first payment on property, house and lot on Anthracite avenue, Moosic Borough, Lot No. 1, Block 16, on Anthracite avenue, balance seven hundred dollars to be secured by judgment. Deed to be executed today.

(Signed) "ALEXANDER KRZYWICKI."

2. At the time when Krajeski paid the $750 and took the receipt he also signed and delivered to Alexander Krzywicki his judgment note for $700, the balance of the purchase money, to be held until the deed should be executed and delivered.

3. The same day a deed for conveying said lot from Alexander Krazywicki and Mary, his wife, to plaintiff was prepared and was executed by Alexander, but his wife refused, and still refuses to execute it, and she never agreed to join with her husband in conveying the property to plaintiff.

4. Again, on August 29, 1907, plaintiff made a formal tender of the balance of purchase money and demanded a deed, but Mary Krzywicki refused to sign it.

5. Alexander Krzywicki is willing to deliver his deed upon receipt of the balance of purchase money, and the plaintiff is satisfied to pay the money, less his damages, and accept such deed, without the joinder of the wife.

6. It appeared that the lot in controversy was No. 11, instead of No. 1, as described in the plaintiff's bill, and at the trial plaintiff asked leave and was permitted to amend his bill accordingly.

7. The plaintiff has had the balance of the purchase money, $700, in hand ready to pay at all times since August 29, 1907, and claims that he should be allowed interest on the same, and on the $750 paid down, as well as the expenses to which he was put in endeavoring to get the deed. He paid $5 for drawing the deed, before he was aware that the wife would not sign it. His other expenses were incurred after he learned that she refused to sign.

CONCLUSIONS OF LAW.

1. Mary Krzywicki having never entered into an agreement to join her husband in conveying the land, she cannot be compelled to execute a deed therefor.

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2. The writing signed and delivered by Alexander Krzywicki is sufficient to bind him to convey the land to plaintiff upon payment of the balance of purchase money, and the plaintiff is entitled to a decree accordingly.

3. The plaintiff having paid $5, the expense of drawing the deed, before he knew that the wife would not sign it, should be allowed to deduct that sum from the purchase money due; he cannot, however, deduct such expenses as he incurred after he learned that the wife would not sign the deed, nor for the loss of the use of the money which he had ready to pay, on the same principle. He is, however, entitled to deduct the interest on the $750 paid down, for the reason that the defendant has had the use of the money and at the same time possession of the property.

4. The wife not having agreed to sign the deed, she cannot be compelled to join in the conveyance.

DECREE.

Now, May , 1908, this cause came on to be heard at the last term of equity court, and was argued by counsel, and, upon consideration thereof, it is ordered, adjudged and decreed as follows, viz.:

That the defendant, Alexander Krzywicki, execute a good and sufficient deed for conveying to the plaintiff, Joseph Krajeski, in fee simple free from encumbrances, except his wife's right of dower, the lot of land described in the bill as amended: and that he deliver the said deed to the plaintiff within fifteen days from this date, upon payment to him by the plaintiff, of the sum of six hundred and sixty-five dollars; and that thereupon the said Alexander Krzywicki deliver up to the plaintiff the judgment note for $700, which was given to secure the balance of purchase money. And it is further ordered that the defendant, Alexander Krzywicki, pay the costs. The prothonotary is directed to enter the decree *nisi* in accordance herewith, and to give notice to the parties or their counsel, exceptions to be filed within ten days from the time of such notice.

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In the Court of Common Pleas of Lackawanna County, No. 243, May Term, 1908.

RULE FOR A NEW TRIAL.

Morris Weiss vs. Maryland Casualty Company of Maryland.

An insurance policy provided that in case of injury which shall immediately, continuously and wholly disable and prevent the insured from performing any and every kind of duty pertaining to his occupation, the company will pay the insured for the period of such disability $25.00 weekly indemnity, and one half that sum for partial disability.

Held: If the insured performed any substantial part of his work, and was able to do so, then he could not recover; but if he did some of the minor parts of his business it would not prevent him from recovering.

Mr. George S. Horn, for plaintiff.

Mr. R. J. Murray, for defendant.

Opinion by Carpenter, A. L. J. May 11, 1908.

Counsel for defendant has assigned several reasons for a new trial in this case. We think the first and the seventh raise the only question which needs consideration.

The extract from the charge complained of in the first reason, standing alone, if correctly reported, is perhaps more favorable to the plaintiff than is warranted by the terms of the policy; but we think the answer to the tenth point for charge, and which is made the ground of the seventh reason for a new trial, lays down the correct rule, and is in harmony with the general tenor of the charge, taken as a whole.

The tenth point and the answer are as follows: "If the plaintiff, Morris Weiss, performed any duty or work pertaining to his business, between June 8, 1904, and August 12, 1904, then he was not wholly and continuously disabled, and cannot recover the weekly indemnity as for total disability."

"Answer: That is affirmed, subject to the instruction that I have given you in my general charge, that if he performed any substantial part of his work, and was able to do so, then he could not recover; but if he did some of the minor parts of the business, such as signing checks and the like of that, that would not, in my opinion, prevent him from recovering, if you find that in other respects he is entitled to recover."

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The policy provides that in case of injury which shall immediately, continuously and wholly disable and prevent the insured from performing any and every kind of duty pertaining to his occupation, the company will pay the insured for the period of such disability $25; weekly indemnity, and one-half that sum for partial disability.

It is beyond question that the effect of the plaintiff's injury was such as to render him unable to transact any substantial part of his ordinary business for a time. According to the great preponderance of the testimony he was unable to do more than sign checks or notes taken to him by his employees, or look after some slight detail of that character; and the effort of the trial judge was to explain to the jury that by a reasonable construction of the policy this would not be regarded as being able to perform any duty pertaining to his occupation, and that if they found that this was all he was able to do, then, while that condition continued, he was disabled within the meaning of the terms of the policy and was entitled to recover the full indemnity of $25 per week for such time. We still think that is the proper interpretation of the language of the policy, and that, while some portions of the charge may be open to criticism, yet taken as a whole it gave the defendant all to which it was entitled. There can be no doubt that the plaintiff was entitled, under the evidence, to recover for either a total disability for the period claimed, or for a partial disability of one-half the sum, and we are of opinion that if a new trial were granted the verdict would be the same as it now is.

We think there is nothing in the other reasons assigned which requires discussion. The rule for a new trial is discharged.

A decedent's estate is held, in Tyler v. Stitt (Wis.) 12 L.R.A. (N.S.) 1087, to be impressed with a trust in the hands of the heir, where to prevent decedent from deeding property to claimant the heir induced her to make a promissory note in favor of claimant, payable after her death, signing the note as comaker, and executing a will in claimant's favor.

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In the Court of Common Pleas of Lackawanna County, No. 242, May Term, 1908.

HABEAS CORPUS.

Commonwealth, ex. rel., Angelina McHale vs. Thomas P. McHale.

The mother's right to the custody, care and companionship of her child should not be interfered with except for substantial reasons affecting its welfare.

Mr. Fred C. Hanyen, for relator.

David J. Reedy, for respondent.

Opinion by Carpenter, A. L. J., May 11, 1908.

This proceeding was instituted by Angelina McHale for the purpose of obtaining the custody of her child, George McHale, a boy about five years of age, who is now living in the family of his paternal grandfather, Thomas P. McHale. The father of the child, who was the husband of the relator and the son of the respondent, died about a year ago at his father's house where he and the child were staying at the time. The respondent resides in the city of Scranton. The relator is living with her father, George W. Stone, at Moscow, and desires to have the child with her in her father's family, while the respondent and his father are anxious to retain him.

It may safely be assumed that, as between the mother and the grandfather of the child, the right of the former to its custody is superior, if, indeed, the latter can be said to have any right. Clearly the grandfather, as such, has no right; and such claim as he may make can be established only by showing circumstances which prove that the welfare of the child requires that the mother be not permitted to have the custody of him. If that be done then the court may, in the exercise of a sound discretion, award the custody of the child to the grandfather.

The mother's right to the custody, care and companionship of her child should not be interfered with except for substantial reasons affecting its welfare. It seems that the respondent has more means than the relator, and it might be that the boy would be surrounded with more luxuries with him than with the mother; but it does not necessarily follow that this would be for his best interests.

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I have no reason to doubt, from the evidence, that the boy will have a comfortable home if given into the custody of his mother; and while, no doubt, the grandfather and his family have become attached to him and would be glad to keep him, yet he should not be estranged from his mother, whose natural love and affection may be expected to be at least as constant and lasting as that of those who are not so near to him.

It is claimed on the part of the defendant that the mother's past life has been such that the welfare of the child demands that he be left in the custody of the respondent, and considerable testimony was taken in an effort to sustain that contention. Nothing, however, was shown which impresses me as of a very serious character, especially as relates to her conduct during the last year. She has been living during that time with her parents in the village of Moscow and engaged in doing housework at least a part of the time for the people of that village, and although strenuous and persistent efforts were made to find evidence against her, nothing was produced which warrants me in finding her unfit to have the custody of her child. On the contrary many of the people who live in that neighborhood and who have seen more or less of her during that time testified that they knew of nothing against her.

And now, May , 1908, after due consideration, it is ordered that the child, George P. McHale, be delivered to the custody of its mother, Angelina McHale.

And it is further ordered that the costs of this proceeding be paid by the county of Lackawanna.

Property sold upon condition that title shall remain in the seller until the price is paid, and retained in the seller's possession subject to the buyer's order, is held, in Whitlock v. Auburn Lumber Co. (N. C.) 12 L.R.A. (N.S.) 1214, to be constructively in the possession of the buyer, so that the loss, in case of its accidental destruction, will fall on him.

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In the Court of Common Pleas of Lackawanna County, No. 869, March Term, 1908.

EXCEPTIONS TO AFFIDAVIT OF DEFENSE AND RULE FOR JUDGMENT.

Edwin A. Warner vs. Rollin S. Myers.

The general statute of limitations in this state is the act of 27th of March, 1713, 1 Sm. L. 76. That does not apply to an action of debt or assumpsit founded on a judgment of another state.

In an action upon a judgment of a sister state the record may be contradicted by evidence of facts impeaching the jurisdiction of the court.

Mr. R. D. Stuart, for plaintiff.

Mr. John F. Scragg, for defendant.

Opinion by Newcomb, A. L. J.

April 27, 1908.

This action is founded upon a judgment of the Supreme Court of New York for the County of Chemung, a court of general jurisdiction corresponding to our common pleas. Profert is made of the record, called the judgment roll, copy whereof is made part of plaintiff's declaration. It shows a regular proceeding by summons, and complaint personally served on defendant in a suit for merchandise sold and delivered, and judgment by default for want of an answer as required by the writ. The record purports to be duly authenticated in accordance with the act of congress. The existence of the judgment and the correctness of the alleged copy of the record are in no way denied. Neither is it denied that the cause was within the jurisdiction of that court. The date of judgment was October 2, 1894.

The action is resisted on two grounds: First, that being over six years old and not revived by any subsequent promise within that time, the claim is barred by our statute of limitations; second, that the summons was not personally served as in the record set forth and that defendant never had any notice of the proceedings in New York until he learned of it through this action.

Neither counsel has furnished a brief nor referred us to any authorities touching either question thus raised.

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As to the first question it is enough to say that the general statute of limitations in this state is the act of 27th March, 1713, 1 Sm. L., 76. That doesn't apply to an action of debt or assumpsit founded on a judgment of another state. So far as concerns the lapse of time the suit would be affected by nothing short of the period of twenty years which gives rise, not to a limitation, but a presumption of payment.

Rogers vs. Burns, 27 Pa., 525.

True, the act of 26th June, 1895, P. L. 375, provides that, "When a cause of action has been fully barred by the laws of the state in which it arose, such bar shall be a complete defense to an action thereon brought in any of the courts of this commmonwealth." But that is not before us for consideration here, as there is no attempt by proper averment to bring the case within its operation. Hence the theory that the suit is open to the plea of the statute of limitations is untenable.

The other matter of defense is **prima facie** sufficient. At an earlier day the courts of this state applied with great strictness the presumption in favor of affirmative recitals of jurisdictional facts in the record. In Wetherill vs. Stillman, 65 Pa., 105 (1870), the Supreme Court by Mr. Chief Justice Thompson said. "The recital shows conclusively the jurisdiction of the parties * * * consequently the defendant's affidavit in this particular amounted to nothing against the record to which it referred." But in Noble vs. Oil Co., 79 Pa., 354 (1876), it was held that the recital in the record of the facts upon which jurisdiction in New York depended was open to inquiry here. There, however, as we understand it, the recital on its face showed a judgment of doubtful validity in that state. A little later, in Guthrie vs. Lowry, 84 Pa., 533 (1877), it was said that "whatever doubts may have been at one time entertained, it is now an incontrovertible position that in an action upon a judgment of a sister state the record may be contradicted by evidence of facts impeaching the jurisdiction of the court." Finally in Price vs. Schaeffer, 161 Pa., 530 (1894), the precise point now at issue came before the court and it was distinctly held, in conformity with the doctrine of the federal decisions therein reviewed, that

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however affirmatively asserted in the record the jurisdiction of the court is always open to controversy in a suit founded on a judgment of another state. This must be considered as in effect overruling Wetherill vs. Stillman and finally settling the question in favor of the defendants here.

For this reason his affidavit must be held sufficient to prevent judgment and the rule to show cause is discharged.

A proceeding to incorporate a drainage district and establish its boundaries is held, in State ex rel. Kochtitzky v. Riley (Mo.) 12 L R.A. (N.S.) 900, to be a civil suit, within the meaning of those terms in a statute allowing a change of venue in such cases.

A riparian owner on a navigable stream is held, in Warner v. Ford Lumber & Mfg. Co. (Ky.) 12 L.R.A. (N.S.) 667, to have no right to maintain booms along the shore in such a manner as to interfere with the operation of a ferry across the stream, which will entitle him to compensation in case of the establishment of a ferry which will interfere with such booms.

The making of a municipal contract to suspend for twenty-five years the power of the city to regulate the rates which a water company shall collect from private consumers in consideration of the construction and operation of waterworks is held, in Omaha Water Co. v. Omaha (C. C. A., 8th C.) 12 L.R.A. (N.S.) 736, not to be an unreasonable exercise of the power to contract therefor.

A riparian owner who has lost by grant or prescription the right to have the water flow from his property in its natural manner is held, in Marshall Ice Co. v. La. Plant (Iowa) 12 L.R.A. (N.S.) 1073, ot have no right to insist that the original condition shall be restored, as against the rights of a riparian owner who secured his rights with reference to, and is benefited by, the changed condition, although the latter has no prescriptive rights.

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In the Court of Common Pleas of Lackawanna County, No. 282, November Term, 1906.

RULE FOR NEW TRIAL AND ALSO FOR JUDGMENT ON THE WHOLE RECORD.

Mary McDonald vs. Mary A. McAndrew.

Defendant procured from her mother a deed for a lot of land upon the faith of a promise to convey the same to plaintiff, when she became of legal age.

Defendant denied the promise and refused to convey. In an action a verdict for plaintiff was rendered. Rule for a new trial was discharged because the evidence of what took place both before and at the time the deed was executed, upon which plaintiff relied, lacked nothing in precision and certainty if it were believed.

In legal effect the facts established not a mere parol trust created by contract, thus being within the statute of frauds of 1856. The trust results by operation of law from the abuse of a confidence reposed in the grantee to carry out the intentions of the grantor. As such it is within the proviso of the statute relating to trusts arising from implication.

Messrs. Willard, Warren & Knapp, for plaintiff.

Messrs. W. S. Huslander and S. B. Price, for defendant.

Opinion by Newcomb, A. L. J.

April 27, 1908.

This action was ejectment to enforce an alleged parol trust. So far as in dispute the verdict must be taken to have established the following facts:

Mary A. Lynott was the owner of two adjoining lots in this city known in the case as Numbers 17 and 18, in a certain block. Eighteen was improved with a dwelling house in which she lived; the other was vacant. She owned no other property of consequence. Some years ago she had devised the property to one of her sons who had his home with her. January 1, 1905, she broke up housekeeping and went to live with her daughter, the defendant. She was then old and complained that she was being neglected by the son. She survived about one year after that. The plaintiff is her granddaughter, the child of a deceased daughter. Her maiden name was Mary Franklin. She and a cousin, Edward Lynn, were boarders in defendant's family while Mrs. Lynott lived there. The disposition of her property was discussed by the old lady with

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some anxiety on various occasions between herself, her daughter and the nephew, Mr. Lynn. She expressed her desire to alter the will and to devise the property to the daughter and granddaughter. Lynn advised her that she could give it to them by deed. This she eventually decided to do, but at the request of the defendant she conveyed both parcels to her, September 25, 1905, upon the faith of the latter's promise to reconvey No. 17 to her niece, Mary Franklin, upon the latter becoming of a legal age. The defendant now denies the promise and refuses to convey.

There was a verdict for plaintiff for lot 17 and the motion for judgment is based upon the refusal of defendant's request for binding instructions. It is conceded that there are no grounds for new trial not involved in the motion for judgment. The sole question, therefore, is whether the evidence is sufficient to warrant the verdict and satisfy the conscience of a chancellor.

It is enough to say that whatever doubt might have been felt at the trial is now dispelled upon a careful review of the evidence. It is believed to have been amply sufficient to support an affirmative answer to the question as submitted, viz.: "Did the defendant procure the deed for the two lots 17 and 18 from her mother, Mrs. Lynott, upon the faith of a distinct promise to convey lot 17 to her niece, and is it a fact that without the promise the mother would not have given the deed? That is the issue." The evidence of what took place both before and at the time the deed was executed, upon which plaintiff relied, lacked nothing in precision and certainty if it were believed. In legal effect then the facts establish not a mere parol trust created by contract, thus being within the statute of frauds of 1856. The trust results by operation of law from the abuse of confidence reposed in the grantee to carry out the intentions of the grantor. As such it is within the proviso of the statute relating to trusts arising by legal implication.

If authority for this conclusion be needed it will be sufficient to refer to a few of the cases:

Hoge vs. Hoge, 1 Watts, 163.
Lingenfelter vs. Ritchey, 58 Pa., 485.
Seichrist's Appeal, 66 Pa., 237.

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Hoffner's Estate, 161 Pa., 331.
Goodwin vs. McMinn, 193 Pa., 646.

No complaint is made as to the manner of submission, but only that the case was submitted at all. We need not therefore consider the adequacy or correctness of the charge. This disposes of the controversy and both rules are discharged.

Under a will devising two tracts of land by description, and then disposing of all personal property, money, and "effects" of every description, the word "effects" is held, in Andrews v. Applegate (Ill.) 12 L.R.A. (N.S.) 661, not to cover testator's homestead which is otherwise undisposed of.

The statutory right to dispose by will of what a person owns at the time of his death is held, in Sturges v. Sturges (Ky.) 12 L.R.A. (N.S.) 1014, not to include damages which may be recovered for his wrongful killing.

The proceeds of land for which testator has given a bond for title after the execution of his will are held, in Re Bernhard (Iowa) 12 L.R.A. (N.S.) 1029, to pass as personalty under the residuary clause, and not under the clause disposing of real estate, although, after testator's death, suit is brought to foreclose the contract, which is settled by the vendees taking title and paying the purchase money.

The exclusion of a riparian owner from the shore of navigable water is held, Mobile Transp. Co. v. Mobile (Ala.) 44 So. 976, 13 L.R.A. (N.S.) 352, to be sufficient to entitle him to maintain a bill in equity against one having the legal title in trust for the public, to establish his rights.

The liability of the beneficiary of a trust to one who advances money to the trustee to pay taxes on the trust property is denied in Dantzler v. McInnis (Ala.) 44 So. 193, 13 L.R.A.(N.S.) 297.

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In the Court of Quarter Sessions of Lackawanna County, No. 287, April Sessions, 1907.

EXCEPTIONS TO REPORT OF VIEWERS.

In Re: Public Road in Benton Township.

When it appears that neither public necessity nor occasion exists for a public road, court will sustain exceptions to a report of viewers and dismiss petition at the cost of the petitioners.

Mr. J. W. Browning, for petitioners.

Mr. J. E. Sickler, for exceptants.

Opinion by Newcomb, A. L. J.

March 2, 1908.

Proceedings for this road were begun to No. 362, June Sessions, 1903. After conflicting reports of viewers and re-viewers the road was disapproved by order filed March 27, 1905. We were convinced that neither public necessity nor occasion for it existed.

A new petition was presented and filed October 20, 1906. Action was deferred until April 1, 1907, to give opportunity for notice to the local supervisors as required by law. The viewers were then appointed and they have made a favorable report.

Further consideration only confirms our former impression that the road would be of no advantage to any one save the owners of a wood acid factory in another county. They are not residents of this state. It would be an advantage to them in and about hauling their wood to the factory. Instead of having to maintain their present private road that expense would be cast on the township. In one respect the facts stated in the former opinion may be inaccurate.

The road connects with no other road in Benton. It is alleged that one terminus is at the end of a public road in Wyoming County and the other at a similar road in Susquehanna County. It was so understood when the other case was before us. It now appears extremely doubtful whether the Susquehanna County terminus is in a public road at all. While there is some slight parol evidence that it was at one time opened by the public authorities of Lenox township in that county it is admitted that no work has ever been

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done on it since, and the evidence shows that the owner of the land maintains a gate across it. This, however, the factory teamsters are at liberty to open as they have to pass and repass. That circumstance is not easily reconciled with the theory that it is a public highway.

So far as the general public in Benton are concerned the road could be of no advantage. So far as concerns those living in Susquehanna and Wyoming Counties, they have another road on the opposite side of the creek practically parallel with and less than a quarter of a mile distant from the proposed road. If we are called upon to consult their convenience it is quite apparent that the new one would afford them no advantage.

It may be a case for a private road but from the standpoint of public convenience it is without merit.

The exceptions are sustained, the report is disapproved and the petition dismissed at the cost of the petitioners.

That a good title may be conveyed by one to whom property is devised "to be the real owner thereof," "for her only proper use, benefit, and behoof during her natural life," "with full permission to use and live therfrom as her necessities may require," "she to have full ownership thereof," is declared in Allen v. Hirlinger, 219 Pa. 56, 67 Atl. 907, 13 L.R.A.(N.S.) 458, although the will also undertakes to devise to another what is left at the death of the first taker.

The right of a widow, prior to assignment of dower, who is in possession of the property, together with the heirs, to maintain trespass *quare clausum* against one entering on the property without right, is denied in Munsey v. Hanley, 102 Me. 423, 67 Atl. 217, 13 L.R.A. (N.S.) 209.

The right of the payee of checks to maintain trover against one who takes them upon the indorsement of the former's special agent without authority to make the indorsement is sustained in Blum v. Whipple, 194 Mass. 253, 80 N. E. 501, 13 L.R.A.(N.S.) 211.

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In the Court of Common Pleas of Lackawanna County, No. 1, May Term, 1905.

SITTING IN EQUITY.

William H. Frank and Portia Frank, his wife, plaintiffs, and Thomas R. Young, et al., Defendants.

Before the grantee in a deed would be required to prove good faith there must be some evidence in the case indicating weakness of mind, fraud or deception which influenced the grantor to make the deed.

Mere relationship by marriage would not create such a confidential relation as would require the grantee to make proof without he was moved to convey by virtue of that relationship.

In absence of fraud a conveyance of real estate will not be set aside by a court of equity but where the answer is responsive to the bill there must be two witnesses or one witness and other evidence equivalent to a second to support the decree of the plaintiff, a chancellor will refuse to reform a written instrument on the uncorroborated testimony of a single witness.

The evidence on the part of the plaintiff must be clear, precise and indubitable, and must carry a clear conviction of its truth and be sufficient in weight to move the conscience of a chancellor to warrant a decree in favor of the plaintiff.

The courts do not permit one to avoid a contract into which he has entered on the ground that he did not attend to its terms, that he did not read the document, which he signed, that he supposed it was different in its terms or that it was a mere form.

Messrs. O'Brien, Martin and Fitzgerald, for plaintiffs.

Mr. H. C. Reynolds, for defendant.

Opinion by Kelly, A. L. J.

From the pleadings and evidence in this case we find the following

FACTS.

1. Prior to the 4th day of June, 1888, one John Mock died, intestate, leaving to survive him a widow and two children, Elizabeth J., intermarried with Thomas R. Young, defendant in this case, and Mary, intermarried with Peter Frank. Peter Frank and Mary Frank are the parents of William H. Frank, one of the plaintiffs, whose wife is Portia Frank, the other plaintiff. At John Mock's death he was seized of the land which is the subject matter of dispute in this case. His widow died shortly after and before any dispute arose between the parties to this suit.

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2. On the 4th day of June, 1888, Mary Frank and Peter Frank, her husband, conveyed the undivided one-half interest of the property in question to Thomas R. Young and Elizabeth J. Young, his wife, in consideration of the sum of $650.00. (Thus Thomas R. and Elizabeth J. Young acquired an estate in entirety in an undivided one-half interest in the property. The title to the other undivided one-half interest was already vested in Elizabeth J. Young as an heir of John Mock, deceased, her father.)

3. Elizabeth J. Young died on the 7th day of March, 1905, while so seized, leaving to survive her Thomas R. Young, her husband, defendant, and her nephew, William H. Frank, plaintiff, but no issue. (Thus William H. Frank, as her heir, acquired title to the undivided one-half interest which she owned in her own right, subject to the rights of Thomas R. Young, her surviving husband, as tenant by courtesy.)

4. On the evening of the 16th day of March, 1905, Thomas R. Young, accompanied by one S. B. Buckley, a notary public, went to the home of William H. Frank, in the borough of Dunmore, having with him a quit-claim deed for the land in question, which had previously been prepared. He asked Frank to do him a favor by signing the paper. Frank took the paper in his hand and was examining it when Young interrupted him, and Frank then asked him to explain the paper; Young said it was a mere nothing, it was just to save lawyer's expenses, and if Frank wouldn't sign it he could have a lawyer sign it for him, and told him further that Mr. Buckley would explain it to him. Whereupon Buckley stated that it was nothing more than to save Young from trouble, delay and the expense of hiring a lawyer. Frank did not read the paper and it was not read to him. He signed it without knowledge of its nature or contents, relying upon the assurances of Young and Buckley that it was nothing but a paper which would in some way save expense to Young in connection with the estate of Elizabeth J. Young, who had died a few days previous, and at Young's request, Portia Frank, his wife, also signed it without knowledge of its nature or contents, also relying upon the same statements and assurances. Neither William H. Frank nor Portia Frank knew the contents of the paper,

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nor that it was a deed, nor that it conveyed any interest in real estate. They were both induced by false representations of its nature and contents to sign it without reading it, relying upon the statements made by Young and Buckley, with whom they were on friendly terms, and in whom they had confidence, that the effect of the paper was simply to save Young trouble and expense. The paper they signed was the deed as set out in the appendix of the plaintiff's bill. After it was signed Young offered Frank a dollar which Frank refused, and Young gave the dollar to Frank's infant child and left the house, taking the paper with him, and two days later he caused it to be duly recorded.

5. Since the trial of the case Thomas R. Young has died, and letters of administration upon his estate have been granted to Catharine Young. By petition and agreement Catharine Young, as administrator of the estate of Thomas R. Young, deceased, and Margaret Bryden, Mary Mears, Alexander B. Young, Catharine Young, David Young, Isabella Smith, Jean B. Law, Elizabeth Young, Robert Young, Helen E. Young and I. H. Young, as heirs and next of kin of Thomas R. Young, deceased, have been added as parties defendant.

6. The fair market value of the undivided one-half interest in the property in question is about seven hundred dollars.

(For further findings of fact see requests and answers thereto.)

From the facts as found we find the following

CONCLUSIONS OF LAW.

1. The obtaining of the signatures of William A. Frank and Portia Frank to the deed in question in the manner found in our fourth finding of fact was a fraud upon them, and the deed should be declared and decreed to be null an void.

2. A decree should be entered requiring the heirs of Thomas R. Young to reconvey to William H. Frank the undivided one-half interest of the property in question.

3. The costs of the case should be paid by the estate of Thomas R. Young, deceased.

(For further conclusions of law see requests and answers thereto.)

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DISCUSSION.

In this case we have no difficulty in finding the facts in favor of the plaintiffs. That they were induced to sign the deed in question through misrepresentations and in ignorance of its nature and effect seems clear to us. The facts as alleged by the plaintiffs are testified to by William H. Frank and Portia Frank, his wife, and by Peter H. Frank, his father, not disinterested witnesses it is true, but competent witnesses, nevertheless, and in our opinion truthful. The defendant denies that there were any misrepresentations made at the time the deed was signed and testifies that the nature and effect of it were explained by him and the notary public who took the acknowledgement, and that the plaintiffs signed and acknowledged it voluntarily with a full knowledge of its contents. But the overwhelming weight of the evidence is against him. It is a significant fact that the notary who accompanied him when the execution of the deed was procured and who is charged by the plaintiffs with participation in the misrepresentations has not been called as a witness. He is prima facie disinterested and his testimony would be important. When the defendant rested his case he reserved the right to call him later, but no request that his testimony be taken has been made and no explanation has been offered as to why he is not called. Another significant fact which is uncontradicted is that the next evening after the deed was signed William H. Frank and his father called upon the defendant and demanded that the deed be returned, and practically charged the defendant with having procured it improperly.

We think the evidence upon which the plaintiffs rely is of such a character as to warrant us in decreeing a cancellation, viz: it is clear, precise and indubitable, and is of the quantity required under the rules of law in such cases as this. It is true the plaintiffs were both able to read the paper and they neglected to do so, and if that were all they could have no relief, for the general rule is that a party executing a legal instrument is presumed to be acquainted with its contents: Greenfield's Est., 14 Pa., 489. But if fraud actively practiced upon a party induces the execution of the instrument the rule does not apply, at least in Pennsylvania.

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The case of Resh vs. First Nat. Bank of Allentown, 93 Pa., 397, is authority for the proposition that where one signs a paper which is falsely represented to be of a certain character which it in fact is not, he may avoid the instrument even though he may be able to read it and neglects to do so, relying upon the representations made to him by the party who procures his signature. In that case the defendant below went to the bank to receive payment of a certificate of deposit for $500; ,and when the money was paid he signed a paper represented by the bank's officer to be a receipt for the $500, but which afterwards proved to be a note for $500, upon which the suit was brought. An offer to show these facts was rejected by the court below, but upon appeal it was held to be error and the judgment was reversed upon that ground. The weight of authority is to the same effect: 14 Am. & Eng. Ency. of Law, 135.

Let a decree *nisi* be entered in favor of the plaintiffs, in accordance with our findings.

The requests of the defendant and our answers to them are as follows:

Requests for findings of fact.

1. John Mock died intestate leaving to survive him a widow and two children, Eliza or Elizabeth, intermarried with Thomas R. Young, the above named defendant, and Mary Frank, intermarried with Peter Frank, the said Peter Frank and Mary being the parents of William H. Frank, the plaintiff in this case. John Mock died seized of the land the subject matter of dispute in this case.

Answer: Granted.

2. On the 4th day of June, 1888, Peter Frank and Mary Frank, his wife, conveyed the property of which the said John Mock died seized, which is the property the subject matter of dispute in this case, to Thomas R. Young and Elizabeth J. Young, his wife, the consideration for which was $650 for all the undivided one-half part thereof. This deed is recorded in Deed Book No. 95, at page 326.

Answer: Granted.

3. By virtue of the deed mentioned in the second request for finding of fact there was vested in Thomas R. Young and Elizabeth J. Young, his wife, prior to the death of Elizabeth J. Young, the

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joint title to the undivided one-half part of the land in controversy. The other one-half interest had become vested in the said Elizabeth Young as the daughter and one of the two heirs of John Mock, deceased.

Answer: Granted.

4. The consideration of $650 expressed in the deed recited last hereinabove, was paid from funds of Thomas R. Young, and no part of the consideration was furnished by Elizabeth, his wife.

Answer: Granted.

5. Elizabeth Young died on the 7th day of March, 1905, intestate, leaving to survive her Thomas R. Young, the defendant, and William H. Frank, a nephew, but without issue.

Answer: Granted.

6. On the 16th day of March, 1905, that William Frank, his wife joining, by deed duly acknowledged before a notary public, conveyed to Thomas R. Young for the expressed consideration of one dollar, their interest in the lot, the subject matter of dispute. This deed was recorded on the 18th of March, 1905, in volume 208, at page 587.

Answer: Granted.

7. Thomas R. Young, after his wife's death, was advised by counsel that the undivided one-half interest which had become vested in Elizabeth Young by the death of her father would possibly pass to the heirs at law of his wife, Elizabeth Young, subject to the court esy of the said Thomas R. Young, and a quit-claim deed was prepared and it was suggested that under the circumstances the nephew plaintiff might be willing to give him a quit-claim deed, and accordingly the deed hereinabove executed by William H. Frank was prepared.

Answer: Granted.

8. This deed of Thomas R. Young took to the house of the plaintiff and in the presence of the plaintiff's wife in the dining room of the said house stated to him as follows: "Will, through my attorney I have found out there is an estate in this deed, that I supposed the property in the case of the death of the one or the other would turn to the surviving one, and that finding out from an attorney that it wasn't so, and through all the expense that I had went to durin-

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the time since we bought it, that without going to any trouble there would be very little left for any." I said, "You are an heir, you and your wife are the only heirs that there is of my wife's and I would like to have you sign off this quit-claim deed." And that he stated to the plaintiff in handing him the deed that it was a quit-claim deed, that they were heirs of his wife and were entitled to a share of it, that he had paid certain charges, sewer, taxes, curb, (sidewalk and expenditures for permanent improvements, that he had also been obliged to purchase an outstanding tax title to the property, and that if this were allowed there would be little left, and ask them to sign the deed.

Answer: Refused.

9. The said Thomas R. Young after making this statement handed the deed to the plaintiff, who appeared to read it and asked some questions about it and was referred by the said defendant to the notary for explanation. Then they left the dining room and went into the sitting room and asked Mr. Buckley about the matter and, apparently being satisfied with the answers, signed the paper. The defendant actually paid the consideration expressed in the deed.

Answer: Refused.

10. That during the conversation the wife of the plaintiff said to the defendant, "Uncle Tom, there is one thing I would like to have you give me, and that is that sideboard that Aunt Eliza had."

Answer: Granted.

11. The plaintiff and his wife, both read and write and are persons of intelligence capable of understanding the effect of the deed which they gave to the defendant.

Answer: Granted.

12. As to all of the conversation between the parties which arose after William H. Frank left the dining room to go into the front room where Peter Frank and the notary sat, occurred in the dining room, the wife of the said defendant passing from the dining room to the kitchen in performance of her duties as house wife.

Answer: Refused.

13. The deed executed by the plaintiff and his wife in this case has printed in letters upon the back of the same the word "Deed"

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approximately one-half inch high. The deed is printed and typewritten throughout and is perfectly clear and legible in every respect.

Answer: Granted.

Requests for conclusions of law.

1. That by the death of John Mock, Elizabeth Young, wife of the defendant, became possessed of an undivided one-half interest in and to the property in dispute.

Answer: Granted.

2. By virtue of the deed of 4th of June, 1888, from Peter Frank and Mary Frank, his wife, to Thomas R. Young and Elizabeth J. Young, his wife, Thomas R. Young and Elizabeth Young became possessed of a joint estate in the undivided one-half part of the land in dispute, and upon the death of the said Elizabeth Young, Thomas R. Young became possessed of the undivided one-half interest in the property in fee by virtue of his survival of his wife. He also became possessed of the courtesy in the other one-half interest which had been vested in his wife by the death of her father.

Answer: Granted.

3. Had Thomas R. Young died prior to the death of Elizabeth Young his interest in the property by virtue of her survival of him would have vested in her the entire title in fee of the property notwithstanding that he had paid the entire purchase money of $650 for the half which he had purchased with his own funds of Peter Frank and Mary Frank, parents of William H. Frank, the plaintiff, by deed of 4th of June, 1888, and the death of Elizabeth Young intestate and unmarried would have vested in William H. Frank the entire title in fee of the property.

Answer: Granted.

4. If at the time the title was taken from Peter Frank and Mary Frank by Thomas R. Young and Elizabeth Young, his wife, it had been agreed between the defendant and his wife that the wife's interest should be held by a joint title, then equitably Thomas R. Young should be decreed to be the owner of the entire title to the property.

Answer: Refused. There is no evidence of such an agreement.

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5. That that part of the conversation which consisted of an explanation by Mr. Young of reasons why William H. Frank should make a deed was in the presence of and heard only by William H. Frank and his wife. The testimony of the man and wife where one of them is a party has but the weight of one witness, and therefore there is not the second witness requisite under the law to warrant the decree prayed for by the plaintiff.

Answer: Refused.

6. The married persons property act does not enlarge the competency of married women except in proceeding to protect or recover her separate property.

Answer: Granted.

7. If the grantors in this deed were moved by the representations of Thomas R. Young as set forth in the request for findings by the defendant the consideration expressed in the deed, although less than the actual value of the interest conveyed, would not be material, nor would the grantee be placed upon the defensive as to inadequacy of the consideration in the absence of fraud, the grantors had a legal right to waive by conveyance their interest in the estate of their aunt if they so desired, and did so understandingly.

Answer: Granted.

8. Before the grantee in this deed would be required to prove good faith there must be some evidence in the case indicating weakness of mind, fraud or deception which influenced the grantors to make the deed, mere relationship by marriage would not create such a confidential relation as would require the grantee to make proof without he was moved to convey by virtue of that relationship.

Answer: Granted.

9. In absence of fraud a conveyance of real estate will not be set aside by court of equity, but where the answer is responsive to the bill there must be two witnesses or one witness and other evidence equivalent to a second to support the decree of the plaintiff, a chancellor will refuse to reform a written instrument on the uncorroborated testimony of a single witness.

Answer: Granted.

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10. The evidence on the part of the plaintiff must be clear, precise and indubitable, and must carry a clear conviction of its truth and be sufficient in weight to move the conscience of a chancellor to warrant a decree in favor of the plaintiff.

Answer: Granted.

11. The execution and acknowledgement of a deed under the circumstances of this case without inquiry is supine negligence and under the evidence does not warrant a decree for the plaintiff. The bill of the plaintiff should be dismissed with costs.

Answer: Refused.

12. A chancellor does not require affirmative proof that a grown man, able to read and write, of apparent intelligence, understood the meaning of a particular contract, but will presume that such contracting party understood the contract in its natural and obvious meaning, taking into account the subject matter of the contract, the surrounding of the party at the time of the making of it, and the willingness of the donor or grantor to comply with the requests of the grantee whose representations disclosed such a condition as that the event of the death of the grantee or donee would have vested an estate in the aunt of the donor for the whole title of a property, when by the death of the donor's aunt the donee would receive but the undivided one-half interest as the surviving husband of the donor's aunt. Such a condition is so inequitable as to properly move a nephew to make the quit-claim deed, set forth in the pleadings in this case.

Answer: Refused.

13. The courts do not permit one to avoid a contract into which he has entered on the ground that he did not attend to its terms, that he did not read the document, which he signed, that he supposed it was different in its terms or that it was a mere form.

Answer: Granted.

The requests of the plaintiffs and our answers to them are as follows:

Requests for findings of fact.

1. That on the 7th of March, 1905, Elizabeth J. Young died intestate leaving to survive her a husband, Thomas R. Young, the

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defendant, and a nephew, William H. Frank, one of the plaintiffs.

Answer: Granted.

2. That at the date of the death of the said Elizabeth J. J. Young she was seized and possessed of an undivided one-half interest of all that certain lot of land situate in the Seventeenth ward of the City of Scranton, County of Lackawanna, and State of Pennsylvania, being lot No. 17, in square or block No. 171, situate on street known as Lincoln avenue, formerly, but now known as Harrison avenue, being forty feet in front on said avenue and one hundred and fifty feet in depth, the measurement of the depth of said lot to commence ten feet inside the sidewalk, and the said owner, his heirs and assigns, have the right to enclose, occupy and use ten feet in front of said lot for cellarway, porch, portico, bay window or shrubbery, but has no right to erect any building thereon. Coal and minerals excepted and reserved.

Answer: Granted.

3. That some time prior to the 16th day of March, 1905, letters of administration were granted by the register of wills of Lackawanna County to Thomas R. Young, the defendant, and under instruction from said Young his counsel drew up and delivered to him a certain quit-claim deed dated the 16th of March, 1905, by which it appears that William H. Frank and Portia Frank, his wife, plaintiffs, in consideration of one dollar conveyed all their right, title and interest in and to the lands and tenements described in plaintiff's second request for finding of fact to Thomas R. Young, which said deed was recorded on the 18th day of March, 1905, in the office of the recorder of deeds in and for Lackawanna County, a copy of which is contained in the appendix to the complainants' bill of complaint and designated "Exhibit A."

Answer: Refused. There is no evidence of the granting of letters of administration to Thomas R. Young.

4. (a) That at meal time in the evening of the 16th day of March, 1905, Thomas R. Young, the defendant, came with one S. B. Buckley, a notary public, to the home of the plaintiffs for the purpose of having them, the plaintiffs, execute and deliver to him, the said James R. Young, said described quit-claim deed; (b) said

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Thomas R. Young offered said quit-claim deed to said William H. Frank for his signature in the presence of said Portia Frank and others: (c) William H. Frank, knowing that he could not read and understand the contents of said paper, requested said Thomas R. Young to explain it to him; (d) said Young then and there omitted to declare that said paper was a deed, and that it conveyed the property of the said William H. Frank and Portia Frank, and that it was intended to divest the interest of the said plaintiffs in the inheritance derived from the said Elizabeth J. Young, but on the contrary declared that the said paper was merely a form to save him, the said defendant, costs in winding up the estate of his deceased wife, Elizabeth J. Young, whose administrator he was, and that an attorney could do the work for him, the said Young, if the said William H. and Portia Frank refused to sign said paper; (e) that said Young turned to the aforesaid notary, S. B. Buckley, and asked him to explain the said paper, and the said Buckley also said to said complainants that it was merely to save costs as the defendant had explained.

Answer: Refused.

5. That thereupon the plaintiffs, William H. Frank and Portia Frank, relying solely and exclusively on the false representations of the said Young and said Buckley, and having no other knowledge or suspicion in regard to same, signed said quit-claim deed to Thomas R. Young, and the said defendant caused the same to be recorded on the 18th day of March, 1905.

Answer: Granted.

6. (a) That at the time of executing said paper said William H. Frank and Portia Frank were possessed of an ordinary education and were not familiar with legal papers; (b) Thomas R. Young was an uncle to said William H. Frank and a man about fifteen years his senior and was administrator of the estate of Elizabeth J. Young, the intestate, who was the wife of the said Thomas R. Young and an aunt of the said William H. Frank; (c) the plaintiffs and defendant were theretofore on friendly terms with one another; (d) the said defendant consulted counsel he was fully aware of the respective rights in the property in dispute, and William H. Frank

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and his wife were not provided with counsel; (e) that the fee simple title of the property of which the said Elizabeth J. Young died seized of an undivided one-half interest was of the value of $1,600; (f) no consideration was received by the plaintiffs or either of them from the said defendant for the said property; (g) that the notary, S. B. Buckley, did not know the paper was a deed until later in the evening he had occasion to make a memorandum of the same in his register, and examined the said paper, but repeated the explanation of Thomas R. Young, supposing that said Young had correctly stated the contents of said paper.

Answer: Refused.

Requests for conclusions of law.

1. That by the death of the said Elizabeth J. Young, William H. Frank became seized of an undivided one-half interest in and to lot No. 15, in block No. 171, on said Lincoln avenue, now Harrison avenue, in the Seventeenth ward of the City of Scranton, Lackawana County, Pennsylvania, as described in the appendix to complainant's bill of complaint, subject to the right of Thomas R. Young as tenant by the courtesy.

Answer: Granted.

2. That the deed of the 16th day of March, 1905, recorded in the office for the recording of deeds in Lackawanna County, on the 18th day of March, 1905, between William H. Frank and Portia Frank, his wife, grantors, and Thomas R. Young, grantee, for the property above described was obtained from the plaintiffs by false and fraudulent representations on the part of the defendant, Thomas R. Young, and is void.

Answer: Granted.

3. That the said deed should be rescinded and delivered to plaintiffs for cancellation.

Answer: Granted.

4. That the said Thomas R. Young, defendant, should be restrained from alienating, disposing of or placing any encumbrances on the interest described in said deed.

Answer: Granted.

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In the Court of Common Pleas of Lackawanna County, No. 6, November Term, 1907.

EQUITY.

Demurrer to Bill of Complaint.

George M. Watson vs. Anthracite Valley Water Company.

The authorities are unanimous in the recognition of the abstract proporition that the legislature cannot, in the exercise of the right of eminent domain, even when the compensation is made on the most liberal terms, take the land from a private owner and appropriate it to any but a public use.

When such proceeding is attempted a bill of equity for an injunction is the proper remedy.

A public use is one which concerns the whole community in which it exists, as contra-distinguished from a particular individual or a number of individuals.

A railroad company, for its sole use, cannot appropriate water under the right of eminent domain.

Messrs. M. J. Martin & L. P. Wedeman, fot plaintiff.

Mr. James E. Burr, for defendant.

Opinion by Carpenter, A. L. J.

June 15, 1908.

The third cause of demurrer raises the only question requiring serious consideration. It appears that the Anthracite Valley Water Company was incorporated for the purpose of supplying water to the public in the township of Carbondale; that it sought to take certain water and land by right of eminent domain, and failing to agree with the owner as to the amount of damage, it tendered a bond which it asked the court to approve. Thereupon this bill was filed.

The sum of the averments in the bill is that the defendant company, under the guise of a charter to supply water to the public, proposes, instead, to supply it solely to the Ontario and Western Railroad Company, a railroad leading from Scranton to a point in the state of New York; and proposes to condemn and appropriate the plaintiff's property for that purpose; and that it does not intend, and never intended, to supply water to the public in the township of Carbondale.

The plaintiff's allegation that the defendant company is not entitled to exercise the right of eminent domain need not be considered,

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except as it has reference to the question of its authority to exercise such right for the purpose of supplying water for private as distinguished from a public use. It clearly has authority by virtue of its charter to exercise the right, and take the plaintiff's property for a proper purpose. The question to be determined is, does the defendant possess the right or franchise to do the act which the plaintiff alleges it has undertaken to do to his injury?

By demurring the defendant admitted the truth of all matters well pleaded in the bill. It thus admitted doing the acts complained of for the purpose and with the effect charged in the bill; and for so doing its charter, under the law, must be its authority.

An inquiry as to whether certain powers are or are not granted by a charter is not open to the objection that the validity of a charter cannot be assailed in a collateral proceeding. Such inquiry is expressly authorized by the act of June 19, 1871, P. L. 1360, which provides that, "In all proceedings in courts of law or equity of this commonwealth, in which it is alleged that the private rights of individuals * * are injured or invaded by any corporation claiming to have a right or franchise to do the act from which such injury results it shall be the duty of the court in which such proceedings are had, to examine, inquire and ascertain whether such corporation does in fact possess the right or franchise to do the act from which such alleged injury to private rights results; and if such rights or franchises have not been conferred upon such corporation, such courts if exercising equitable power shall by injunction, at suit of private parties * * * restrain such injurious acts."

In Bly v. White Deer Mountain Water Co., 197 Pa. St., 80, it was held that a water company has no authority to supply water in territory adjacent to the place in which it is located, and no authority under its right of eminent domain to condemn and appropriate waters for such purposes; and if it attempts to do so a land owner who is threatened with injury has a standing under the act of June 19, 1871, in equity, for an injunction to restrain such act. In that case Justice Mestrezat said: "As the defendant company has no right to supply water in territory adjacent to White Deer township, it has no authority under its right of eminent domain to condemn and appropriate

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waters for such purposes. The right to condemn water depends upon the purpose for which the company may lawfully use it."

In Deemer v. Bells Run Railroad Co., 212 Pa. St., 491, the railroad company tendered a bond to secure the payment of all damages sustained by plaintiffs in the taking of their land for railroad purposes. Plantiffs thereupon filed a bill in equity averring that the charter of the company had been obtained solely for private use and benefit, and not for any public use or for the transportation of person and property generally, and prayed for a decree restraining it from taking plaintiffs' land. The court below awarded an injunction, which the supreme court on appeal dissolved for the reason that it did not clearly appear that the railroad company was taking private property for private use. It was conceded, however, that if the proofs had warranted it an injunction was the proper remedy. The supreme court said: "The question is whether, possessing such right (of eminent domain) it is attempting to exercise the same for public purposes, or, under cover of it is attempting to take private property for purely private uses. It possesses no franchise to take private property for a private use, and if it is attempting to do so, this proceeding was properly instituted under the act of June 19, 1871, P. L. 1360. * * * If, under its right of eminent domain, the company is about to take private property, not for a public, but for a private use, the appellees are entitled to relief by injunction to be awarded under the act of June 19, 1871, for the charter of the company cannot be perverted to accomplish objects for which it was not granted. But conferring, as it does, the right of eminent domain upon the appellant, which has surveyed and located the route of its road and built three-sevenths of it, the burden of showing that the company is exercising franchises that it does not possess is upon those alleging that it is attempting to do what it is not authorized to do—constructing a railroad for purely private purposes. If this clearly appears, it will be regarded as a perversion of the commonwealth's charter, which will not be permitted. In the two cases on which the court below relied as authority for issuing its injunction—McCandless's Appeal, 70 Pa., 210, and Edgewood Railroad Company's Appeal, 79 Pa., 257—this clearly appeared. In the first case we said the railroad was 'clearly intended solely for use' of the mill and machinery of Rhodes, and in it 'the

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public could have no advantage whatever.' In the second it was clear that the road was intended to carry the coal of the Hampton company, and nothing else."

"When a person finds his property or his rights in danger of being injured or invaded by the act of a corporation the act of 1871 gives him the right, without waiting for the assistance of the commonwealth, to challenge the authority of the corporation to the possession of 'the right or franchise to do the act from which such alleged injury to private rights results.' The corporation thus challenged must show its authority, and if such authority fails at any point the defense fails. What the plaintiff complains of is a want of authority to do the thing complained of, and complete present existing authority must be shown to support the right asserted." Edwards vs. Pittsburg Junc. R. R. Co., 215 Pa., page 603.

The authorities are unanimous in true recognition of the abstract proposition that the legislature cannot, in the exercise of the right of eminent domain, even when the compensation is made on the most liberal terms, take the land from a private owner and appropriate it to any but a public use; and the cases above referred to show clearly that a bill in equity for an injunction is the proper remedy when such proceeding is attempted.

This brings us to the question whether it is the purpose of the defendant, in taking the property of the plaintiff, to appropriate it to a public use. If not, then it cannot legally be condemned.

A public use is one which concerns the whole community in which it exists, as contradistinguished from a particular individual or number of individuals, 23 Am. Eng. Enc. of Law, 458, (2 Ed.)

If the special benefit to be derived from the lands sought to be appropriated is wholly for private persons, the use is a private one, and is not made a public use by the fact that the public has a theoretical right to use it, or that the public will receive an incidental or prospective benefit therefrom. 15 Cyc. 581. See Lance's Appeal, 55 Pa., 16.

By demurring to the plaintiff's bill the defendant must be taken as admitting that its object in taking the water from the plaintiff's land is to supply it solely to a railroad company, which, in my opinion, is not a public use, and it, therefore, has no authority to appropriate it under the right of eminent domain.

And now, June 15, 1908, the demurrer is overruled, and the defendant is given thirty days in which to answer the bill.

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In the Court of Common Pleas of Lackawanna County No. 343 January Term, 1907.

Rule to Amend Statement.

Mary Ann Cheland vs. The Borough of Old Forge.

A cause is out of court when arbitrators are actually chosen and remains so until brought back by appeal.

Messrs. Vosburg & Dawson, for plaintiff.

Mr. John H. Bonner, for defendant.

Opinion by Carpenter, A. L. J.

June, 1908.

Upon the argument of this rule it was admitted that the cause had been ruled out and arbitrators chosen. This being the case the court has no jurisdiction to allow the amendment. In Hoffman vs. Locks, 19 Pa. St., 57, Justice Black says: "A cause is not beyond the power of the court until arbitrators are actually chosen." And in Duncan vs. Bell, 28 Pa. St., 516, Justice Armstrong says: "It follows that after that, it is, until brought back by appeal."

In Sollenberger vs. Schader, 9 Luz. Leg. Reg., 2, it was decided that a declaration cannot be amended while the cause is pending before arbitrators. See also Gallagher vs. Dean, Ibid 15; Kunes vs. McCloskey, 10 C. C., 542.

From the time the jurisdiction of the arbitrators attaches the cause is out of court.

The rule to amend the statement is discharged.

One who procures another who is mentally incapacitated to transact business, to draw checks upon her bank account, and obtains the money thereon from the bank, is held, in Meyer v. Doherty (Wis.) 113 N. W. 671, 13 L.R.A.(N.S.) 247, to be liable to the drawer, or to her personal representatives in the event of her death, as for a wrongful conversion of the money so obtained, the same as if he had obtained it directly from her.

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In the Court of Common Pleas of Lackawanna County, No. 809 November Term, 1907.

Rule to Stay Fi. Fa.

Alva J. Noble vs. John A. Toohill.

A certiorari was taken to the judgment of the alderman. The court affirmed the judgment. The defndant paid to the alderman the debt, interest and transcript costs. Plaintiff issued an execution for the costs that accrued in court. Upon a rule to stay the fi. fa. court held that defendant was bound to know the legal effect of the affirmance and that the complete discharge of his liability could only be had by paying the costs taxed in court.

Mr. W. S. Huslander, for plaintiff.

Mr. T. A. Donahoe, for defendant.

Opinion by Newcomb, A. L. J.

June 15, 1908.

In proportion to the claim in suit the costs now involved may seem to amount to a hardship on defendant. But, if so, it is due to his own error from which we cannot relieve him. The case arises out of a certiorari taken by him to the judgment of an alderman. February 17th this year the judgment was affirmed. It was in favor of plaintiff for $5.25. Thereupon defendant sent his check to the alderman covering debt, interest and transcript costs. The alderman satisfied the judgment and on February 29th sent the defendant a voucher to that effect. March 2d the plaintiff caused this fi. fa. to be issued on the judgment as affirmed in this court. The writ went out for the face of the judgment as well as $9.43 costs. That included the trancript costs, $3.18, as well as $2.00 paid by defendant for the certiorari.

To the extent of the judgment and these two items of costs we think the defendant may be relieved.

Another item of costs is the attorney fee of $3.00. The right to collect this is in controversy. To the writer it seems very doubtful whether it is properly taxable in such case. But it is in accordance with the uniform practice in this court since its establishment. It has been assumed to be within the fee bill of 1868 providing for such fee in "every case prosecuted to judgment." While there is reason to

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doubt the validity of the assumption, it now rests upon long judicial sanction and I do not feel warranted in disturbing it. But it serves to bring into view the status of the fi. fa.

Whether it be "a case prosecuted to judgment" within the meaning of the fee bill or not, there can be no doubt that upon affirmance it became a judgment of this court for purposes of execution.

Robbins v. Whitman, 1 Del., 410.
Echoff v. Harlan, 1 Ches., 101.

Neither can there be any doubt that as such it carried the usual incident of costs accurring on the proceedings in court. Consequently the defendant is liable for such costs. That liability he could not discharge by paying the judgment to the alderman with the costs accured under his jurisdiction. The only question, then, is what effect can now be given to that payment in the consideration of this rule.

The act of 20th March, 1810, sec. 11, 5 Sm. L., 167, expressly authorizes and requires the alderman "to receive the amount of the judgment, if offered by the defendant or his agent before execution, etc." The operation of this statute cannot be restricted or impaired by the rule that upon affirmance of the judgment execution can be had in the common pleas. For the rule springs wholly from the judicial view of the nature of the judgment entered here, and involves no interpretation or construction of the statutory functions of the alderman. So, while the defendant could, "before execution," pay the amount of the judgment to the alderman, he paid, so to speak, at his own risk of being called upon thereafter by execution out of this court to pay the costs accrued here. He was bound to know the legal effect of the affirmance, and that complete discharge of his liability could only be had by paying the costs taxed here.

Therefore, the payment to the alderman can only be treated as payment **pro tanto,** and to that extent only can he now get relief.

The costs still collectible are as follows:

Prothonotary, ...	$1.25	
Writ, ...	.60	
Sat., ...	.20	
Attorney, ...	3.00	$5.05,

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together with the sheriff's costs on the fi. fa. which appear to be $7.60.

It is no doubt vexatious to have to pay this amount of sheriff's costs on a judgment of $5.00, and that already paid before the writ issued. But that could have been avoided by the exercise of due care.

It is ordered that the fi. fa. be stayed upon payment within one week of the sum of $12.65 to the sheriff in satisfaction of $5.05, the unpaid costs taxed on the writ, together with the sheriff's costs; otherwise the rule to be discharged.

That several items entered in one account were furnished at different times and upon different orders is held, in Williams-Abbott Electric Co. vs. Model Electric Co., 134 Iowa, 665 112 N. W. 181, 13 L. R. A. (N.S.) 529, not to avoid the rule that an account cannot be split into different demands, but that, in case there is an attempt to do so, a judgment upon one portion of it will bar further action.

The right of a bank which, under mistake of fact as to the genuineness of the obligation, delivers to an ex-county treasurer upon a forged obligation of the county a check payable to the order of the county treasurer, which the ex-treasurer delivers to the county in satisfaction of personal indebtedness to it, to recover back the payment, is sustained in Hathaway vs. Delaware County, 185 N. Y. 368, 78 N. E. 153, 13 L. R. A. (N.S.) 273, if the claim of the county against the ex-treasurer and his sureties has been in no manner jeopardized or impaired.

The right of a lien creditor to enforce his lien after a discharge of the debtor in bankruptcy is sustained in Flint vs. Chaloupka (Neb.) 111 N. W. 465, 13 L. R. A. (N. S.) 309, in harmony with the great weight of authority.

The lability of the supreme tent of an unincorporated fraternal beneficiary order for injuries received by a candidate in the performance of those ceremonies which generally accompany his initiation, which are conducted by the officers of a subordinate tent, is sustained in Thompson vs. Supreme Tent, K. M. 189 N. Y. 294, 82 N. E. 141, 13 L. R. A. (N. S.) 314.

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In the Court of Common Pleas of Lackawanna County No. 298 May Term, 1908.

Rule to Show Cause why Judgment in Ejectment Should not be Opened.

Frances Penelly vs. B. S. MacDonald.

Plaintiff leased a store to defendant for "one year with the privilege of five." The lease contained a provision that "notice be given or required three months before the expiration of any one year by either party."

Defendant notified plaintiff that he desired to exercise his option under the provision of said lease, and to remain therein as tenant for at least "one year" more.

Held: If defendant chose to except option he was bound to accept it as it was written, for five years, not for "one year at least."

Messrs. M. J. & T. H. Donahoe, for plaintiff.

Messrs. Vosburg & Dawson, for defendant.

Opinion by Carpenter, A. L. J.

June, 1908.

By an agreement in writing dated April 10, 1907, Frances Penelly leased to B. S. MacDonald one store room of a building in the city of Scranton, for one year, with the privilege of five years. It provided as follows: Three months' notice to be given or required three months before the expiration of any one year by either party to this lease, notice to be given in writing. Among the printed matter was the following: "A lawful continuance of the tenancy beyond said term shall be deemed a renewal thereof for the further term of . . . . . to end at the expiration thereof without further notice. And every further lawful continuance shall be deemed a further renewal for a like term, to end in like manner. And every renewal or holding over shall be subject to the provisions of this indenture."

It also provided: "Upon the expiration or other determination of said term, or of any renewal, any attorney may appear for the second party in an amicable action in ejectment, and confess judgment."

By virtue of this provision an amicable action in ejectment was filed and judgment entered therein against the defendant April 11, 1908, the plaintiff filing therewith her affidavit setting forth: That the term of the lease ended at midnight on the 9th of April, 1908; and further that the lessee was duly notified legally to quit and deliver possession of said premises to said lessor, upon the expiration of the

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said lease in accordance with the provisions thereof. Thereupon the defendant presented his petition to court and obtained this rule to open the judgment.

In the petition, which is verified by affidavit, it is stated: "Your petitioner says that three months prior to the 10th of April, 1908, he personally notified the plaintiff that he desired to exercise his option under the provisions of said lease, and to remain therein as tenant for at least one year more from April 10, 1908. That notwithstanding said notice by petitioner to the plaintiff a notice was served by the plaintiff upon your petitioner to remove from said premises on the 10th day of April, 1908, which notice was not served until January 10th, 1908, less than three months before the expiration of the lease."

A copy of this petition was served on the plaintiff's attorney April 14, 1908, together with a copy of the rule granted thereon, and it became the duty of the plaintiff to file an answer thereto within ten days thereafter, or the allegations of the petition would be taken as confessed under the rules of court. The plaintiff filed an answer, but it was filed thirteen days after the service of the petition and rule, and defendant claims that it should not be considered for that reason. No depositions appear to have been taken by either side.

It need not be decided whether plaintiff's answer ought to be considered or not, for the reason that the defendant's petition, admitting all it contains, is insufficient to warrant the opening of the judgment. It states that three months prior to the 10th of April, 1908, he personally notified the plaintiff that he desired to exercise his option under the provisions of said lease, and to remain therein as tenant for at least one year more from April 10, 1908. There was no such option. The language is: "One year with privilege of five." If the lessee chose to accept the option he was bound to accept it as it was written, for five years, not for "one year at least," and the fact, as stated in his petition, that notwithstanding said notice the plaintiff served a notice upon him to remove from the premises at the end of his year, April 10th, may well be taken to signify her refusal to accept his proposition to extend the term one more year.

The lease provided: "Three months' notice to be given or required three months before the expiration of any one year by either party to this lease, notice to be given in writing." This is not artistically

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drawn but it evidently was intended to apply to the lessee's option, and the mere holding over is not an acceptance of the option by the lessee for a term of five years. Murtland vs. English, 214 Pa., 325. Especially is this true in view of the lessee's allegation that he gave notice of his desire to remain in possession for at least one year more. Such notice qualified and explained the manner in which he remained in possession after the end of his term, and could not be regarded as an acceptance of the option to extend the term to five years. If it be claimed that the lessee was entitled to three months' notice by the provisions of the lease the answer is that the notice given him January 10th was in time. Duffy vs. Ogden, 64 Pa., 240. McGowen vs. Sennett, 1 Brewster, 397.

The term expired April 10th and after that time the lessor had a right to treat the lessee as a trespasser. Williams vs. Ladew, 171 Pa., 369.

The rule to open the judgment is discharged.

The liability of a depositer to whom an insolvent bank has paid a check in the usual course of business is denied in McGregor v. Battle, 128 Ga. 577, 58 S. E. 28, 13 L. R. A. (N.S.) 185, where the depositor had no notice of the bank's insolvency.

Forgery of part of the signatures of makers to a joint and several note is held, in First Nat. Bank v. Shaw, 149 Mich. 362, 112 N. W. 904, 13 L.R.A. (N.S.) 426, to be no defense against a bona fide holder by makers whose signatures were genuine.

The right of an innocent payee to recover, under the uniform negotiable instruments law, against a party who signed and delivered the instrument in blank to a third person, where the latter, in filling out the blanks, exceeded his authority, is denied in Vander Ploeg v. Van Zuwk (Iowa) 112 N.W. 807, 13 L.R.A. (N.S.) 490.

A call in deed to a well-known and long-used pond is held, in Patapsco Guano Co. v. Bowers-White Lumber Co. (N. C.) 59 S. E. 538, 13 L.R.A.(N.S.) 318, to stop at the edge of the pond, and not to carry title to the center.

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In the Court of Common Pleas of Lackawanna County, No. 230 May Term, 1907.

Rule for a New Trial.

Elma Jenkins vs. A. O. Courtright

Where a man is indebted and unable to pay his debt and confesses a judgment to his wife for a sum largely in excess of his indebtedness to her, without any mistake or miscalculation, and she proceeds and collects more than is justly due, it is a fraud upon other creditors.

Fraudulent collusion between husband and wife is so easy of execution and so difficult of proof that it is a well settled rule that a wife claiming as a creditor against other creditors of the husband must prove her claim by evidence clear and satisfactory to a degree beyond that required of other creditors, and leave no doubt of its good faith and its truth in fact.

The rule which requires proof in support of the wife's claim to be clear, convincing and indubitable applies to cases in which the title to specific property claimed is involved in doubt.

Messrs. Vosburg & Dawson, for plaintiff.

Messrs. Leach & Morrow, for defendant.

Opinion by Carpenter.

June, 1908.

This was an interpleader to try the question of the title to a horse. Courtright had sold the horse in question and another horse to A. N. Jenkins, the husband of this plaintiff, and held his note for a hundred dollars, dated April 2, 1906, upon which on July 31, 1906, he brought suit, and having recovered final judgment he levied upon this horse, whereupon Elma Jenkins, the wife of the defendant in that case, claimed the horse belonged to her by virtue of a constable's sale. To establish her title she showed that on July 23, 1907, her husband went before an alderman and confessed judgment in her favor for $500, upon which execution issued and the two horses and a harness were sold to her for $400.

To show consideration for her judgment against her husband she undertook to prove that she loaned him several sums of money at various times amounting in the aggregate to $500. No writing was shown to prove the loans, and the testimony of both the plaintiff and her husband was that the last loan which she claimed to have

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made to him, of $150, was made about the holidays in 1906, whereas the judgment was confessed July 23, 1906, about five months prior thereto, yet at the trial it was claimed to have formed a part of the consideration of the judgment.

In view of this we said to the jury: "If he owed her $500 he had a right to do this (confess a judgment in her favor) notwithstanding he may have owed someone else at the time, but if, on the other hand, he did not owe her the $150 which she mentioned, and if that was loaned to him about the holidays of 1906, some five or six months after this judgment was confessed, then the indebtedness at that time was only about $350, and he would have no right to give her a judgment for $500; and the judgment for that reason, if you find that that is the case, would be fraudulent, and they would have no right to proceed upon it and sell this property, and the plaintiff therefore would not have the right to recover. So, it will be for you to determine, under all the evidence, whether the husband did owe his wife $500 at the time that he appeared before the alderman in July, 1906, and gave her a judgment for that amount. * * * If it was for a larger amount than he owed her, that is, for $150 more, then she would have no right to recover. If the difference was but small, and by some miscalculation the judgment exceeded the amount to a small extent of the actual indebtedness, then that would not invalidate the judgment."

This instruction is complained of by counsel for plaintiff, but we are not satisfied that it was error. We think it is the law that where a man is indebted and unable to pay his debts, and confesses a judgment to his wife for a sum largely in excess of his indebtedness to her, without any mistake or miscalculation, and she proceeds and collects more than was justly due, it is a fraud upon other creditors. Gates vs. Johnston, 3 Pa. St., 52.

The question whether the judgment was given for more than was due, and if so whether the excess was included by miscalculation, was submitted to the jury, and they found against the plaintiff notwithstanding that after her attention was called to it by a request from a juror to hear her testimony read, her counsel asked and was permitted to recall her, when she said the last item of $150 was prior to the confession of judgment.

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We do not think that the measure of proof required of the wife in affirming defendant's second point was more severe than has been laid down in many cases. In Dalley's Estate, 200 Pa. St., at page 142, Justice Mitchell said: "Fraudulent collusion between husband and wife is so easy of execution and so difficult of proof that it is the well settled rule that a wife claiming as a creditor against other creditors of the husband must prove her claim by evidence clear and satisfactory to a degree beyond that required of other creditors, and leave no doubt of its good faith and its truth in fact."

The rule which requires proof in support of a wife's claim to be clear, convincing and indubitable applies to cases in which the title to specific property claimed is involved in doubt. When indebtedness only is alleged, it is sufficient if the proof be clear and satisfactory. Rine vs. Hall, 187 Pa., St., 264. In Eavenson vs. Powall, 182 Pa. St., 587, which was an interpleader to determine the ownership of property, it was said: "It is incumbent upon the wife to prove her title by evidence which does not admit of a reasonable doubt."

By the third reason for a new trial it is stated that there is no evidence to show that Courtright was a creditor of Jenkins at the time when this judgment was confessed.

The case was tried throughout on the theory that Jenkins was indebted to Courtright when he confessed judgment to his wife; and the record of the judgment offered in evidence on the part of the defendant shows that he was so indebted. It is true that this does not appear by the stenographer's notes which contain but a brief reference to the record, but it was offered for that purpose, and an inspection of the record shows that suit was brought before an alderman from whose judgment an appeal was taken and filed in court, and the plaintiff thereupon filed a statement claiming $100 on a note dated April 2, 1906, payable in three months, and judgment was entered for want of an affidavit of defense.

We are not convinced that any injustice has been done to the plaintiff. The rule for a new trial is discharged.

That ejectment will not lie for an incorporeal right or easement to use land as a public park is declared in Canton Co. v. Baltimore (Md.) 11 L.R.A. (N.S.) 129.

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In the Court of Common Pleas of Lackawanna County, No. 243 May Term, 1905.

Rule for a new trial.

Morris Weiss vs. Maryland Casualty Company of Maryland.

A person who performs any substantial work or duty pertaining to his business is not wholly and continuously disabled, and cannot recover a weekly indemnity as for total disability.

Messrs. O'Brien & Kelly, for plaintiff.

Mr. R. J. Murray, for defendant.

Opinion by Carpenter, A. L. J.

June, 1908.

Counsel for defendant has assigned several reasons for a new trial in this case. We think the first and the seventh raise the only question which needs consideration.

The extract from the charge complained of in the first reason, standing alone, if correctly reported, is perhaps more favorable to the plaintiff than is warranted by the terms of the policy; but we think the answer to the tenth point for charge, and which is made the ground of the seventh reason for a new trial, lays down the correct rule, and is in harmony with the general tenor of the charge, taken as a whole.

The tenth point and the answer are as follows: "If the plaintiff, Morris Weiss, performed any duty or work pertaining to his business, between June 8, 1904, and August 12, 1904, then he was not wholly and continuously disabled, and cannot recover the weekly indemnity as for total disability."

"Answer: That is affirmed, subject to the instructions that I have given you in my general charge, that if he performed any substantial part of his work, and was able to do so, then he could not recover; but if he did some of the minor parts of the business, such as signing checks and the like of that, that would not, in my opinion, prevent him from recovering, if you find that in other respects he is entitled to recover."

The policy provides that in case of injury which shall immediately, continuously and wholly disable and prevent the insured from

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performing any and every kind of duty pertaining to his occupation, the company will pay the insured for the period of such disability $25, weekly indemnity, and one-half that sum for partial disability.

It is beyond question that the effect of the plaintiff's injury was such as to render him unable to transact any substantial part of his ordinary business for a time. According to the great preponderance of the testimony he was unable to do more than sign checks or notes taken to him by his employees, or look after some slight detail of that character; and the effort of the trial judge was to explain to the jury that by a reasonable construction of the policy this would not be regarded as being able to perform any duty pertaining to his occupation, and that if they found that this was all he was able to do, then, while that condition continued, he was disabled within the meaning of the terms of the policy and was entitled to recover the full indemnity of $25 per week for such time. We still think that is the proper interpretation of the language of the policy, and that while some portions of the charge may be open to criticism, yet taken as a whole it gave the defendant all to which it was entitled. There can be no doubt that the plaintiff was entitled, under the evidence, to recover for either a total disability for the period claimed, or for a partial disability of one-half the sum, and we are of opinion that if a new trial were granted the verdict would be the same as it now is.

We think there is nothing in the other reasons assigned which requires discussion. The rule for a new trial is discharged.

That no authority to compel a private corporation in which a decedent held stock to produce its books and papers is conferred upon a court by a statute authorizing it to appraise decedents' estates for the fixing of the inheritance tax, and for that purpose to compel the attendance of witnesses and the taking of their testimony under oath, is declared in State ex rel. Pabst Brew. Co. v. Carpenter (Wis.) 8 L.R.A. (N.S.) 788.

Recovering an uncollectible judgment for the purchase price of property procured by fraud is held, in Standard Sewing Mach. Co. v. Owings (N. C.) 8 L.R.A. (N.S.) 582, not to be a bar to an action for the fraud.

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In the Court of Common Pleas of Lackawanna County, No. 507 May Term, 1908.

Certiorari.

Star Enameling Co. xs. J. W. Aitkin, et. al., a limited corporation, trading vs The Rookery Trading Co.

A joint service of a summons on two defendants by a copy left at "their dwelling house and handing it to an adult member of their family", was invalid. Each defendant was entitled to service and the two could not be joined for that purpose.

Mr. F. M. Gardiner, for plaintiff.

Mr. H. C. Butler, for defendant.

Opinion by Newcomb, A. L. J.

June, 1908.

In Forschner vs. Fitzgerald, 4 Kulp, 250, judgment was reversed because the case presented by the transcript "was a mere muddle." Yet in some respects it had a marked advantage over this. There was no trouble in telling who was intended to be sued and it also appeared that the claim was for "damages for trover and conversion." That at least suggested a cause of action of which the magistrate had jurisdiction. Here suit was in form assumpsit, but as to the cause of action there is not even a hint. It is freely admitted that suit was intended to be brought against a joint stock association organized under the act of 1874 as "The Rookery Trading Company, Limited." It is also admitted that as such the company was not legally served with process and the judgment would be fatally defective exept for what is conceived to be a waiver.

As to J. W. Aitkin there was a valid personal service. As to the other two defendants there was a joint service by a copy left at "their dwelling house and handing it to an adult member of their family." This was invalid. Each was entitled to service and the two could not be joined for that purpose. In default of appearance judgment went "against the defendants" as for their joint liability Oct. 4, 1907.

This writ was taken by "The Rookery Trading Company, Limited", April 18th this year. But in view of the somewhat am-

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biguous character of the proceeding it will be treated as taken on behalf of the defendants against whom the judgment was entered. It is apparent that the magistrate had personal jurisdiction only as to one of the defendants. For that reason alone the judgment against all three was erroneous and will have to be set aside unless the defect of jurisdiction has been cured in the meantime. The lapse of more than twenty days before this writ was taken is immaterial so far as concerns the defendants not served.

Lacock v. White, 19 Pa., 495.

The plaintiff seeks to sustain the judgment only as against the Trading Company. For this purpose counsel relies upon what he considers a waiver arising from a belated and very informal entry of bail for stay of execution. On October 26th execution was issued. Thereupon, and probably the same day, according to the transcript, "defendants ask for a stay of execution. I, J. W. Aitkin, hold myself as absolute security in the sum of $130.36 for the paymemt of the judgment with interest and costs." The next entry is of April 10th this year when an alias execution went out.

It is not contended, as it might be, that the request for a stay by "the defendants" was a waiver as to the individuals against whom the judgment stands. On the contrary it is urged that it operates as a waiver by the company, and in effect subjects it to the judgment The only ground for this reasoning apparent on the record is that one of the individuals sued became the surety. This foundation is altogether too frail to support the argument. The only question of waiver that can fairly arise out of this circumstance is as to the parties against whom judgment was entered. While the record imports a request by "the defendants" yet it appears by depositions, not inconsistent with the record, that J. W. Aitkin, without any participation with the other defendants, at his own request, procured the stay in order to intercept the sale of the company's assets which were threatened with seizure under the execution. This fact is not in controversy and it is believed to be competent to make proof of it by depositions for the purpose of explaining the record. It might be effective as against the one making the request if judgment could be affirmed as against him alone. But that cannot be

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done, and as to the other defendants it repels the inference of waiver. We cannot give it the effect contended for by plaintiff that it converts this proceeding into a judgment against the company.

We have, then, a summons in assumpsit against three individuals, adding certain matters of description not affecting their indentity as defendants; legal service as to one alone; judgment by default against all three; nothing to show the cause of action; and waiver only by the one who was properly served. This was plainly erroneous and the judgment is reversed.

Failure of a contract for the sale of real estate because of inability of the purchaser to perform is held, in Riggs vs. Turnbull (Md.) 8 L.R.A. (N.S.) 824, to deprive the broker, who undertook to procure a purchaser, of his right to a commission, although the defaulting party had bound himself by contract to complete the purchase, and had paid a portion of the contract price.

To enforce the right of subrogation, it is held, in Parsons vs. Urie (Md.) 8 L.R.A. (N.S.) 559, that equity will annul an attempted extinguishment of a mortgage by the holder upon being paid the amount due with money borrowed by a portion of the mortgagors, who, in the mortgage, have covenanted to pay the debt, and who have refused to consent to the extinguishment of the mortgage, the extinguishment being sought merely to further the interests of persons who have purchased at execution sale the interest of one of the original mortgagors and who will be fully reimbursed, even though the mortgage is not extinguished.

Where a person, upon purchasing goods through a known broker, pays him therefor prior to delivery, it is held, in Robinson, Norton, & Co. v. Corsicana Cotton Factory (Ky.) 8 L.R.A.(M.S.) 474, that the loss falls on him, and not upon the owner, who ships the goods to his own order, and draws upon the broker for the price, with bills of lading attached, the draft remaining unpaid because the broker becomes insolvent.

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In the Court of Common Pleas of Lackawanna County, No. 207, May Term, 1908.

Rule for Decree in Divorce.

Mary McAvoy vs. George McAvoy.

It is erroneous to assume that a defendant's appearance by attorney who accepted notice of the rule to take testimony qualified the plaintiff as a witness as to the merits.

Mr. Ralph W. Rymer, for plaintiff.

Mr. Frank E. Donnelly, for defendant.

Opinion by Newcomb, A. L. J.

June 15, 1908.

The only thing that can give us jurisdiction of the defendant here is the entry of an appearance for him by counsel. The writ was served in New York city. But conceding the jurisdiction there is another difficulty with the plaintiff's case. Outside of her own testimony the evidence is insufficient to warrant a decree. Counsel may have assumed that the defendant's appearance by attorney who accepted notice of the rule to take the testimony qualified the plaintiff as a witness to the merits. If so the assumption is believed to be erroneous. Her competency depends upon the act of May 23, 1887, P. L. 158, sec. 5, clause (c), which provides that neither husband nor wife shall "be competent or permitted to testify against each other except in those proceedings for divorce in which personal service of the subpoena or of a rule to take depositions has been made upon the opposite party, or in which the opposite party appears and defends, in which case either may testify fully against the other, and except also that in any proceedings for divorce either party may be called merely to prove the fact of marriage." Here the opposite party "appeared" by counsel but he did "defend." He filed no answer and made no contest of any kind. To "defend" an action at law has a very well understood and technical meaning. In the absence of anything in the context to indicate otherwise it must be understood, like "appear," to have been used in the statute in its technical sense. As so understood it is to make denial either by traversing the essential allegations of fact averred by the plaintiff, challenging

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their sufficiency in law, or the jurisdiction of the court. The mere formal appearance by attorney falls far short of such denial. His acceptance of service of the rule cannot help the plaintiff because it is not so provided in the statute. We are not at liberty, even if so disposed, to impart anything into the statute by construction.

In order to give the plaintiff an opportunity to make further proof we will not dismiss the proceeding, but for the reason stated the rule for decree is discharged without prejudice.

A child who, upon receiving from her father a conveyance of land, deeds land owned by her to him with understanding that it is to be her sister's portion, agreeing that, if the father dies without having the deed recorded, it shall be returned to her, and she shall then convey the property to her sister, but who intends not to comply with the request, is held, in Crossman v. Keister (Ill.) 8 L.R.A. (N.S.) 698, in case the father dies without conveying the property to the sister, to take her share of the property as heir of the father as a constructive trustee for the sister.

To entitle a party who has testified in his own behalf to corroborate his evidence by proof of his general reputation for truth and veracity, it is held, in First Nat. Bank v. Blackman (Okla.) 12 L.R.A.(N.S.) 364, that there must have been a direct attack upon his character in that regard, or an attempt made to impeach him by evidence of particular acts of criminal or moral misconduct, or by proof of contradictory or inconsistent statements made to others or admitted on cross-examination, or by evidence of corruption on his part in connection with the case in which he appears.

A plea of payment of a less amount than is acknowledged to be due, which was borrowed for the purpose, and a satisfaction and release of all claims and demands, is held, in Schlessinger v. Schlessinger (Colo.) 8 L.R.A. (N.S.) 863, not sufficient as one of accord and satisfaction.

The divorce of the parties is held, in Alles vs. Lyon (Pa.) 10 L. R.A.(N.S.)463, not to sever an estate by the entireties,

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In the Court of Common Pleas of Lackawanna County, No. 79, September Term, 1906.

Rule for a new trial.

Western Launch & Machinery Co. vs. Arthur Frothinghan, et. al.

The admission of depositions was objected to on the ground that a rule and interrogatories were not served on the defendants or their counsel. One of the defendants was made a defendant by order of court upon the assumption that notice to her of an application to amend followed by the order allowing the amendment, was sufficient to get her in court.

An examination of the record showed that there never was an appearance entered for any of the defendants by any attorney.

Held: That the depositions were improperly admitted; and as the testimony of the witnesses contained in the deposition was important in sustaining the plaintiff's case, a new trial must be granted.

Messrs. W. H. Davis and E. W. Thayer, for plaintiff.

Messrs. Vosburg & Dawson, and Mr. M. J. Martin for defendant.

Opinion by Carpenter, A. L. J.

June, 1908.

This action was replevin. The writ issued against the Rocky Glen Park Company. The sheriff returned that he found the property described in the writ in the possession of Arthur Frothingham, whom he summoned May 22, 1906; that one William B. Reynolds intervened by leave of court May 25, 1906, gave bond and the property was delivered to him. The record shows further that on May 24, 1906, counsel for plaintiff presented a petition to court setting forth that at the time of issuing the writ he supposed that the Rocky Glen Park Company was a corporation, but that he had since learned that it was a partnership composed of Arthur Frothingham and Annette Reynolds, and asking to amend the record so that the defendants should be Arthur Frothingham and Annette Reynolds, co-partners doing business as the Rocky Glen Park Company. Same day, it appearing that notice of the application had been served on Arthur Frothingham and Annette Reynolds, the amendment was allowed.

The next thing we find by the record is an affidavit of defense filed June 12, 1906, by William B. Reynolds, the intervening defendant; and three days later, to wit, June 15, 1906, we find that the plaintiff's statement was filed. No affidavit of defense or plea of any kind was filed at any time by either Arthur Frothingham or Annette Reynolds. What the effect of the affidavit filed by Reynolds three

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days in advance of the statement was need not now be determined, but it may not be out of place to suggest to counsel the propriety of making an effort to get the record in shape so that the case may be properly tried.

One of the reasons for a new trial was the admission of depositions taken in Indiana on a commission. The admission of these depostions was objected to on the grounds, among others, that the rule and interrogatories were not served on the defendants or their counsel. It was thereupon shown by counsel for plaintiff that notice was given to Vosburg & Dawson, who it was said were attorneys of record for all the defendants. But an examination of the record shows that there has never, to this time, been an appearance entered for any of the defendants by any attorney. Annette Reynolds was made a defendant by order of court. Assuming as we perhaps may, that notice to her of the application to amend followed by the order allowing the amendment, was sufficient to get her in court, she was entitled to be treated thereafter as a defendant, and when the interrogatories were filed and commission issued they should have been served upon her or some one representing her. There is nothing in the record to indicate that any attorney represented her at any time until the case came to trial, so that no matter what notice may have been given to counsel representing the other parties for whom they had appeared in court on different occasions, as the record shows, we feel constrained to hold that no notice of the taking of depositions was given to Annette Reynolds or any one representing her, and as she was a defendant and the jury was sworn as against her, whether erroneously or not, need not now be decided, the depositions were improperly admitted; and as the testimony of the witnesses contained in the depositions was important in sustaining the plaintiff's case a new trial must be granted.

We might add that in our opinion the evidence as to the value of the property replevied, at the time of issuing the writ, was very meagre if not entirely insufficient to submit to the jury. The theory on which the case was tried might possibly obviate this as to Arthnr Frothingham and Annette Reynolds, but could not as against the intervening defendant, William B. Reynolds.

The rule for a new trial is made absolute.

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In the Court of Quarter Sessions of Lackawanna County No. 263

February Sessions, 1908.

Exceptions to Report of Viewers.

In Re: Road in Newton Township.

The course of a proposed road between the specified termini is exclusively for the viewers and any attempt by the petition and order to control or limit this discretion by intermediate points is fatal to the proccedings.

The termini are to be fixed by the court basing its order upon a petition which properly designates them.

Mr. P. F. Loughran for petitioner.

Messrs. Walker & Capwell for exceptants.

Opinion by Newcomb, A. L. J.

June 15, 1908.

The order appointing viewers in this case followed the language of the petition. In that way the viewers were directed to view and make report upon a proposed public road extending between the designated termini "in a northeasterly and a northwesterly direction." This is the ground of the principal exception to the report which was in favor of the road.

It has been said over and over again that the course of a proposed road between the specified termini is exclusively for the viewers and that any attempt by the petition and order to control or limit this discretion by intermediate points is fatal to the proceeding. The authority of the viewers is limited solely by the termini.

Road in Merion Twp., 58 Pa., 66.

So, where the petition and order called for a view of a proposed road "from a point", etc., "through the lands of Joseph Isenberg, John Clark and John K. Sissler" to the other terminus, it was held to be obnoxious to the rule and the proceedings were set aside.

Catherine Twp. Road, 76 Pa., 189.

In principle that case cannot be distinguished from this, and on its authority we feel constrained to hold the first exception well taken.

The only other exception pressed goes to the failure of the viewers to note the improvements. if any, through which the route was laid. But as to that we deem it unnecessary to express an opinion at this time.

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It is noted that the termini are designated in the petition and order with some latitude. The starting point is a point on a certain public road "within a distance of one hundred yards from the southerly side of a lane," etc. This is not called in question by the exceptions. But we ventnre to suggest that it is somewhat lackin in certainty. That is the one thing that ought to be made certain in the order appointing the viewers. This for the reason, above referred to that it is the one thing controlling the discretion of the viewers. "Within" the distance of one hundred yards; leaves the starting point undetermined until after the viewers get on the ground, when it would have to be selected by them, perhaps at the instance of some interested party. The same condition was true as to the other terminus, except that the latitude for choice was less. It was there "within fifty yards of the foundation," etc. The termini are to be fixed by the court basing its order upon a petition which properly designates them.

Road in Lower Marion, 58 Pa., 66.

We are not called upon to decide as to the sufficiency of the designation in this instance because the question isn't raised. If it were, it would be by no means free from doubt.

For the reason already stated the first exception is sustained, the report set aside and the proceeding dismissed.

That secrecy is not required by a constitutional provision that all elections by the people shall be by ballot, at least so as to exclude the numbering of the ballots to correspond with the poll list, is held in Ex parte Owens (Ala.) 8 L.R.A. (N.S.) 888.

In a prosecution under a statute providing that every person who shall steal, or obtain by robbery, the property of another in any other state, territory, or country, and shall bring the same into the state, may be convicted and punished for larceny in the same manner as if the property had been stolen within the state, it is held, in State vs. White (Kan.) 92 Pac. 829, 14 L.R.A.(N.S.)556, that the question whether the property brought into the state was stolen is to be determined by the law of the state.

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In the Court of Common Pleas of Lackawanna County, No. 420, November Term, 1907.

Rule to Open Judgment.

Building Exchange vs. The American Surety Co., Defendant, and F. J. Johnson, Intervenor.

The condition of a bond was that the principal "shall comply with the order and regulations issued by direction of a majority of the members of the plaintiff association, of whom he was one."

Judgment by default for want of affidavit of defense was taken against a surety. The principal moved for leave to intervene *pro inter esse suo.*

Held: That unless the plaintiff was an exclusive tribunal to determine the principal's default, he was entitled to contest his liability on the ground that he disregarded no order issued by a majority of the members.

Mr. Ralph W. Rymer, for plaintiff.

Messrs. M. W. Lowry and T. P. Duffy, for defendant.

Opinion by Newcomb, A. L. J.

June 15, 1908.

This action is founded on a bond given to the plaintiff by the intervenor whereon the other defendant was surety. By its terms the obligation was joint and several. Suit was brought against the surety alone which went to judgment by default for want of an affidavit of defense. Motion to strike off the judgment at the instance of Johnson was afterwards refused by opinion filed January 6th this year. Thereupon he moved for leave to intervene *pro interesse suo* which was allowed, and upon his further petition this rule to open the judgment on his behalf was granted.

In character the bond is somewhat peculiar. As to the principal its condition is that he shall comply with the orders and regulations issued by direction of a majority of the members of the plaintiff association, of whom he was one. The condition on which the several liability of the surety became fixed varies somewhat from that of the principal. The former was to be determined by "due proof to the said surety that the principal after service of a copy of any decision, order, prohibition or regulation has been declared in default thereof by the board of governors, and has upon demand failed to pay to said obligees the amount of this undertaking, then within thirty

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days after receiving notice of said service and default, the said surety agrees to pay," etc.

Thus the liability of the principal depends upon the fact of breach; that of the surety upon the receipt of certain *ex parte* proofs that a breach has been declared by the board of governors.

Unless the terms of Johnson's membership in the plaintiff association—to which reference is made in the bond—make the board of governors the exclusive tribunal to determine his default, he is entitled to contest his liability on the ground, which he takes, that he has disregarded no order issued by a majority of the members. By reason of notice of the suit from his surety, he will be ultimately liable for any judgment that may be recovered against it. Hence, he must be heard here or not at all.

On the depositions it would seem at least very doubtful whether there was any action by a majority of the members upon the order involved in the alleged breach of the bond. For this reason we think the judgment should be opened. The argument took a much wider range but it would be inopportune at this time to express an opinion as to the other questions sought to be raised, They can be considered to better advantage on a full hearing.

The rule to show cause is made absolute, the judgment is opened and the intervening defendant let into defense. The plaintiff's statement to stand as the declaration to which the defendant shall plead non assumpsit.

Promissory notes belonging to a resident of Kansas, given by residents of Missouri, and secured by trust deeds of real estate in the latter state, which have never been brought into Kansas, but are left for safe-keeping only in the vault of a bank in Missouri, are held, in Johnson County vs. Hewit, Kansas, which has its location in the 493, to constitute personal property in Kansas, which has its location in the county, township, and school district of the residence of its owner, within the meaning of the act relating to the assessment and collection of taxes.

The burden of proof is held, in McAleer vs. Good (Pa.) 10 L.R. A.(N.S.)303, to be on defendants, in an action for unlawful arrest and false imprisonment, to show that it was by authority of law.

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In the Court of Common Pleas of Lackawanna County, No. 1277

September Term, 1907.

Demurrer to Plaintiff's Statement.

Use of John J. Becker vs. M. S. Jordan.

A cause of action well pleaded is not vitiated by an erroneous averment as to the measure of damages.

A statement should include every ingredient of a good cause of action averred in clear, express and unequivocal terms and with completeness, accuracy and precision that were required at common law.

Messrs. Vosburg & Dawson, for plaintiff.

Messrs. Willard, Warren & Knapp, for defendant.

Opinion by Newcomb, A. L. J.

June 15, 1908.

This action is assumpsit, apparently for damages for defendant's breach of his contract to sell plaintiff "certain stock."

As stated, the date of the contract was the 29th of July, 1907, and various times shortly before and after that date. The subject matter was "certain stocks of the value at that time of $5,000 more or less."

The terms were:

1. Parties "agreed" that plaintiff should pay down part of the purchase money and balance as mutually agreed, and that in the meantime defendant should hold the stocks as collateral security for the balance to become due at purchaser's option.

2. The collateral should not be sold unless its value should fall below the balance owing.

3. In such case it was not to be sold without reasonable notice and a fair opportunity to plaintiff to increase the collateral to an amount exceeding the balance owing.

4. The defendant was to collect from one Washburn "certain moneys" in his hands belonging to plaintiff and apply them on account of the balance.

These being the terms of the contract the breach alleged is as follows:

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"Defendant neglected to give notice to plaintiff that more payment was required on his stock, and to collect from Washburn the money in his hands," and sold the stock. Thereby "plaintiff lost the payment he had made and also the value of such stock over and above the amount of payments made, a total loss of $1500."

If anything, this was probably a wagering contract, in a stock transaction, for the breach of which there can be no recovery at law. But that we do not undertake to decide. Assuming it to be entirely free from such criticism it is still open to very substantial objections.

1st. The subject matter is altogether too uncertain. If there was a sale or contract of sale the plaintiff must disclose what it was that he contracted for, or give some reason why that cannot be done. "Certain stocks" will not answer the purpose. That shows neither the character, quantity or value of stocks.

2d. There is nothing to show the contract price on which the alleged purchase was made.

3d. While the statement assumes that some part of the price was paid down, it is not so distinctly averred nor is there any suggestion as to how much is claimed to have been paid.

4th. The date of the alleged breach does not appear, nor the value of the stocks, if anything, at that time.

5th. There is nothing to show what amount of money is claimed to have been in Washburn's hands, nor what the defendant was to do in and about its collection. That may or may not have been a lawful contract.

6th. It doesn't appear whether or not the money was collectible nor what measures that ought to have been taken in an effort to collect were omitted by defendant.

From such faulty averments no court can define the terms of a valid contract nor say that an actionable breach has been committed. It is not too much to say that it violates the cardinal principle of pleading, to wit., that the plaintiff's statement must not only be a concise but also a precise statement of his cause of action. A declaration more lacking in precision could hardly be expected to come before the court. So far as the statement attempts to show the measure of damages, it is of minor importance. Because if a good cause of action were disclosed the damages follow as a matter

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of course. In other words, a cause of action well pleaded is not vitiated by an erroneous averment as to the measure of damages. But it is noticeable that the averment in that particular here is quite as faulty as the statement of the alleged contract and its breach. The case calls for no further discussion. It only need be said that the statement does not include every ingredient of a good cause of action averred in clear, express and unequivocal terms and with the same completeness, accuracy and precision that were required at common law.

Byrne v. Hayden, 124 Pa., 177.
Newbold v. Pennock, 154 Pa., 594.
Fitz v. Hathaway, 135 Pa., 274.
Clark v. Lindsay, 7 Pa. Sup. C., 47.

The demurrer is sustained.

In Illinois Steel Co. v. Schroeder (Wis.) 113 N. W. 51, 14 L.R.A.(N.S.) 239, it is declared that equity will not, upon the ground of preventing a multiplicity of suit, entertain a suit to have the plaintiff adjudged the owner and entitled to immediate possession of each of numerous and separate tracts of land to which the respective defendants claim title by adverse possession, although each of the defendants seeks to tack his possession to the alleged enty and adverse possession of the same individual through whom they all claim; and notwithstanding that, at the time of the commencement of the equity suit, eighty-four ejectment actions commenced by the plaintiff against the several defendants were pending; and that in other similar actions judgment had been rendered for the plaintiff; and that in none of them had the title to the land been adjudicated to be in the defendant or defendants.

A statute authorizing the issuance of municipal bonds is held, in Knoxville vs. Gass (Tenn.) 104 S. W. 1084, 14 L.R.A.(N.S.) 519, not to be made unconstitutional as embracing two subjects, by the fact that bonds of a certain amount are authorized for one municipal purpose, and of another amount for another municipal purpose.

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In the Court of Common Pleas of Lackawanna County, No. 13, November Term, 1907.

Equity.

Harmom E. Capwell vs. The School District of West Abington Township.

The directors of a township school district contracted for the erection of a building to be used not only for school purposes but also for the purpose of storing township property; for holding meetings by the township officials and by an order known as the Patrons of Husbandry, or Grangers.

Held: That the intention of the directors to erect a building to be used in part by the township authorities and the Patrons of Husbandry was not capable of execution under the law.

While acting within the limitations of the law, the judgment of school boards relative to matters committed to them cannot be interfered with by the court.

The erection of a school building and selection of site therefor are peculiarly within the discretion of the directors, and in the absence of bad faith, or clear abuse of discretion, the court will not interfere therewith.

Mr. R. H. Holgate, for plaintiff.

Mr. Fred C. Hanyen, for defendant.

Opinion by Carpenter, A. L. J.

May, 1908.

The plaintiff filed his bill in this case November 9, 1907, averring that the directors of the school district of West Abington township had contracted for the erection of a building to be used not only for school purposes, but also for the purpose of storing township property; for holding meetings by the township officials, and by an order known as the Patrons of Husbandry, or Grangers; and praying for an injunction restraining them from using the funds of the school district for such purpose.

From the bill, answer and proofs I find the following

FACTS

1. The School District of West Abington township comprises the township of West Abington, which is a small township approximately three miles in extent from north to south, and about the same from east to west. It has at present between thirty and forty children of school age.

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2. It had, until recently, two school houses, one of which was situated near the northwesterly border of the district, and the other somewhat southeast of the center.

3. Sometime ago the board decided to consolidate the two schools into one to be more centrally located than either of the two, and in pursuance of such purpose it vacated the school near the northerly side of the district and sold the building, and in the summer of 1907 purchased a lot of ground near the center of the district and proceeded to erect thereon the building about which complaint is made.

4. It was the original intention of the directors to construct a building to be used not only for school purposes, but also for township purposes, and as a meeting place for the Patrons of Husbandry; but the question of their authority so to do having arisen, they sought legal advice, and having been advised that they had no authority to erect a building to be used for other than school purposes they abandoned the original intention, and it is now their intention to erect a building to be used for school purposes only. However, as in pursuance of the original intention they had made an excavation for a basement and constructed the walls thereof, and had procured lumber suitable for the building as originally intended, and had the same delivered on the ground, it is their purpose to utilize this basement and this lumber in constructing the building for school purpose; leaving the upper story to be finished when the increased population of the district may make the additional room necessary.

5. The board appointed two of its members a building committee, and passed a resolution to pay them $1.50 per day for their services, but subsequently rescinded the resolution.

6. The probable cost of the building as at present intended to construct it, will be about twelve hundred dollars. The total valuaation of property in the district taxable for school purposes is $59,636. The directors propose to sell bonds to the amount of $1,100, using the proceeds together with other funds in paying the costs of building.

7. On the 26th of August, 1907, the board of directors passed a resolution to offer for sale bonds to the amount of $1,150, but having been advised that their procedure was not in conformity with the law, they subsequently, on October 14th, passed another resolu-

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tion to sell $1,100 of bonds, in which, as also in the steps leading up to it, the requirements of law were complied with.

The plaintiff has submitted twenty-seven requests for findings of fact. Those numbered 1 to 5 inclusive are found as requested. No. 6 is refused. Numbers 7 to 11 inclusive are found as requested. Numbers 12, 13 and 14 are found as requested, except the minutes show four members present instead of three; the note authorized was for $150 instead of $200.

No. 15. The plans are for a building 36 x 40, the change having apparently been ageed upon by the directors without formal action. No. 16 is found as reguested.

No. 17. I am not prepared to find as requested. Numbers 18 and 19 are found as requested. Numbers 20 to 27 inclusive, I cannot find as requested.

Defendants have submitted fifteen requests for findings of facts. Those numbered 1 to 4 inclusive are found as requested. Numbers 5 and 6 as drawn are refused. Numbers 7 to 15 inclusive are found as requested.

CONCLUSIONS OF LAW.

1. While acting within the limitations of the law, the judgment of school boards relative to matters committed to them cannot be interfered with by the court.

2. The erection of a school building and selection of site therefor are peculiarly within the discretion of the directors, and in the absence of bad faith, or a clear abuse of discretion the court will not interfere therewith.

3. The original intention of the directors to erect a building to be used in part by the township authorities and the Patrons of Husbandry was not capable of execution under the law; but their intention as at present expressed to erect a building for school purposes only, as it can be carried out without incurring an indebtedness in excess of the amount permitted by law, is within the discrection given them by law and cannot be prevented by the court.

4. The steps taken by the board of directors for the purpose of erecting the building as they at present intended to do it, are in accordance with law.

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5. The building which they propose to erect, is such as in their discretion they are authorized by law to erect.

6. The plaintiff's bill should be dismissed.

The plaintiff has submitted eleven requests for conclusions of law. The first, understanding it to have reference to the uses to which the building was to put as originally intended, is affirmed.

Numbers 2 and 3 are affirmed. Numbers 4, 5, 6 and 7 are refused. Number 8 is affirmed. Numbers 9, 10 and 11 are refused.

Defendants have submitted ten requests for conclusions of law. They are all affirmed except the ninth. The proper disposition of the costs is a matter of some difficulty. It appears, by the evidence, that the defendats had discovered before the bill was filed, that theire purpose to erect a building for other than school purposes could not be carried out, and had abandoned it; but it does not appear that the plaintiff had any knowledge of this, and under all the circumstances of the case I am disposed to hold that each party shall pay their own costs.

DISCUSSION.

It is plain that the original intention of the directors to construct a building to be used for other than school purposes could not have been carried into effect under the law; but when they learned that this could not be done and abandoned the purpose and decided to construct a building to be used for school purposes only, they were within the authority given them by law, and whether the building which they now propose to erect is necessary for the accommodation of the children of the district, and is such as is suitable for the purpose, must be determined by the directors themselves.

So long as they keep within the limits prescribed by the law, and do not create an indebtedness exceeding the statutory limitation the court cannot undertake to prescribe the character of building which they shall erect.

The law has clothed school directors with certain powers and placed upon them certain duties, and so long as they perform these duties within the limits of the authority given them, they cannot be interfered with by the court. Taylor vs. Winton School District, 4 Lacka. Legal News, 231; Roth vs. Marshall, 158 Pa., 272.

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It may be that if these directors were commencing anew to erect a building for school purposes, and had not constructed a basement and procured lumber for the superstructure, they did, under the mistaken notion that they had a right to do so, they would think best to erect a building of a different character, but I am satisfied that their mistake was not wilful, and if under the circumstances as they now exist, in the exercise of a reasonable discretion they are of opinion, as I believe they are, that the best interests of the district justify them in erecting the building as they now propose to do, the court has no authority to prevent them.

DECREE.

Now May , 1908, this cause came on to be heard at the last term of equity court, and was argued by counsel, and, upon consideration thereof, it is ordered, adjudged and decreed as follows, viz.: That the plaintiff's bill of complaint be dismissed. And it is further ordered that each party pay their own costs. The prothonotary is directed to enter the decree *nisi* in accordance herewith, and to give notice to the parties or their counsel, exceptions to be filed within ten days from the time of such notice.

The surety on the bond of a county auditor, which pays to the county the amount which it has paid upon non-negotiable tax refunding certificates issued by the deputy auditor in favor of fictitious payees and sold by him to a bank, is held, in National Surety Co. v. State Sav. Bank (C. C. A. 8th C.) 156 Fred. 21, 14 L.R.A.(N.S.) 155, to be entitled to be subrogated to the right of the county to maintain an action for money had and received, against the bank, to recover the amount so paid, where the bank was grossly negligent in failing to inquire as to the genuineness of the certificates and their indorsement.

The requirement of a statute that operators of automobiles upon public highways shall stop upon being signaled to do so is held, in Mahoney v. Maxfield, 102 Minn. 377, 113 N. W. 904, 14 L.R.A. (N.S.) 251, not to impose upon them the duty, upon signal, to stop the motive power of the vehicle in addition to stopping the vehicle itself.

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In the Court of Quarter Sessions of Lackawanna County No. 158

January Sessions, 1908.

Rule to Quash Indictment.

Com. of Penna. vs. Kemmerer, et. al.

Forgery is the false making or the materially altering, with intent to defraud, of any writing, which if genuine, might apparently be of legal efficiency, or the foundation of legal liability.

To constitute the crime it is essential that three things should exist: (1) There must be a false making or other alteration of some instrument in writing; (2) there must be a fraudulent intent; and (3) the instrument must be apparently capable of effecting a fraud.

Receipts which acknowledge the payment of money to apply on account do not admit of uncertainty. It is not neccessary to aver that there was "an account" or an indebtedness between the parties. The receipts plainly imply such facts.

Mr. Joseph O'Brien, District Attorney, for plaintiff.

Mr. W. W. Baylor, for defendant.

Opinion by Edwards, P. J.

May 18, 1908.

The indictment charges the defendants with the fraudulent making of a certain instrument in writing, to wit, a receipt, to the prejudice of another's right and with the intent to defraud. There is also a count for uttering the instrument in question. The indictment avers that the receipt was fraudulently made and that the defendants knew it was false.

The only ground on which the indictment is attacked is that it contains no averment of an indebtedness due from the Kemmerer Iron and Steel Company to the United Engineering and Foundary Company, the two parties to the receipt.

The district attorney claims that such an averment is unnecessary because the receipt on the face of it shows that it is apparently capable of being used to the prejudice of another. Our attention is also called to the provision in the criminal code that every indictment shall be deemed sufficient in law which charges the crime substantially in the language of the act of assembly, and to the other provision which states that an allegation of an intent to defraud a particular person need not be set forth in the indictment.

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We repeat here what has been said by Judge Kelly in Commonwealth v. Mitchell, 7 Lack. Jurist, 129, as to the essential elements of the crime of forgery:

"Forgery is the false making or materially altering, with intent to defraud, of any writing, which if genuine, might apparently be of legal efficiency, or the foundation of legal liability: (1) Bishop Crim. Law, 7th Ed., sec. 572. To constitute the crime it is essential that three things should exist: (1) There must be a false making or other alteration of some instrument in writing; (2) there must be a fraudulent intent; and (3) the instrument must be apparently capable of effecting a fraud: 19 Cyc. 1373. It must be of some apparent legal efficacy and one which if genuine might injure another, and, therefore, an instrument void on its face because meaningless, indefinite, or lacking a payee is not the subject of forgery: Ibid 1379-80."

In the Mitchell case the indictment was quashed because the alleged fraudulent instrument on its face was meaningless, vague, of no apparent legal efficiency, and "a mere incoherent jumble of words and figures"; and there was no extrinsic averment in the indictment which threw any light upon the legal character of the paper alleged to be forged.

In the present case the defendants are charged with the fraudulent making and uttering of two receipts, which read as follows:

"May 23rd, 1906.

"Kemmerer Iron & Steel Co.,

"Scranton, Pa.

"Gentlemen:- Beg to acknowledge receipt of yours of the 20th inst., also remittance of $10,000.00 to apply on account. Please note that account due us is $11,375.00 and we would be pleased to have you remit difference by return mail.

"Yours truly,

"United Engineering & Foundary Co.

"Edward Kneeland,

"Treasurer."

and "June 23rd, 1906.

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"Kemmerer Iron & Steel Co.

"Scranton, Pa.

"Gentlemen:-We are pleased to acknowledge receipt of your remittance of $15,000.00 to apply on account, and for which advance over what you actually owe us to date you state is for the purpose of hurrying us to accommodate you with an early shipment of machinery. We appreciate this and will certainly do our utmost to give you best of delivery and trust we will be successful. Thanking you again we are

"Yours truly,

"United Engineering & Foundary Co.

"Edward Kneeland,

"Treasurer."

There can be no doubt or uncertainty as to the exact legal character or efficacy of the foregoing receipts. One acknowledges the receipt "of $10,000 to apply on account" and the other "of $15,000 to apply on account." Why is it necessary to aver that there was "an account" or an indebtedness between the parties? The receipts plainly imply that fact. A receipt is one of the most commonly known instruments of writing. As evidence it is of the highest and most satisfactory character and of great probative effect. It is *prima facie* evidence of the facts recited by it. Of course it may be explained or contradicted; but this does not destroy its well-defined character as evidence in a court of law. How can it be maintained for a moment that the receipts copied in the indictment are not of "apparent legal efficacy", or, if false, are not "apparently capable of effecting a fraud"? On this point we quote from the opinion in Commonwealth v. Bachop, 2 Sup. Ct. Rep., 294:

"All that is required is certainty to a common and general intent, and that need not be averred which is apparent to the court and appears from a necessary implication; where the tendency to prejudice the rights of persons appears on the face of the instrument, averring the fraudulent nature and giving copy is sufficient, if it is apparent that the instrument was capable of being used to the prejudice of a person's rights: Biles v. Com., 32 Pa., 529; 8 Am. & Eng. Ency. of Law, title, 'Forgery.'"

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Defendants' counsel refers to the case of Commonwealth v. Shissler, 9 Phila., 587. While the defendants' contention is supported to some extent by the opinion in this case, we can overlook the fact that the indictment therein under consideration failed to aver that the fraudulent alteration was made "to the prejudice of another's right", an essential part of such an indictment. Other cases support the views expressed by us in this opinion. We refer to McClure v. Com., 86 Pa., 353; Com. v. Phipps, 16 Phila., 457; and to Sadler's Criminal Procedure, pages 289, 290, and the cases there cited.

The rule to quash the indictment is discharged.

A statute requiring licenses for the sale of intoxicating liquors to be drunk upon the premises is held, in Sopher vs. State (Ind.) 81 N. E. 913, 14 L.R.A. (N.S.) 172, not to be unconstitutional upon the grounds that it authorizes what, in the absence of statute, would constitute a wrong and public nuisance.

A charter of a social club permitting it to sell tobacco, soft drinks, and other articles at all times to its members is held, in Hanger vs. Com. 107 Va. 872, 60 S. E. 67, 14 L.R.A. (N.S.) 683, to be properly revoked as fraudulently obtained to avoid the Sunday law, when secured by those in control of a drug company which has been forced to observe the law against the sale of such articles on Sunday, the club advertising for members, who become such by merely signing an application and receiving a membership certificate, the organization occupying a room in the building of the drug company, which furnishes the supplies and receives 90 per cent of the gross receipts of sales to members, no meetings ever being held by the general members, and only occasional mettings by the directors.

Specific performance of a contract to convey for a consideration of less than $13,000 a one-fifth interest in any property which the party may, at any time, in any manner, acquire in a certain territory, is denied in Marks v. Gates, 83 C. C. A. 321, 154 Fed. 481, 14 L.R.A. (N.S.) 317, where at the time of the contract he has no interest, but at the time of the suit has acquired property alleged to be worth more than $750,000.

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In the Court of Common Pleas of Lackawanna County.

Commonwealth ex. rel. vs. W. A. Jennings. Quo Warranto.

Conclusions of Fact and Law.

There was no statute either creating or recognizing the office of borough solicitor, prior to the act of April 25, 1907.

That the town council was before said act clothed with implied power to employ an attorney by the year, if in its discretion it saw fit, has never been doubted. Previous to the act of 1907 a person who accepted such employment did so with the limitations annexed, namely, for the term of one year.

Messrs. Vosburg & Dawson, for plaintiff.

Messrs. M. J. Martin and R. J. Murray, for defendant.

Opinion by Newcomb, A. L. J.

May 25, 1908.

The relator asserts title to the office of solicitor for the borough of Old Forge in this county. The writ was issued at his instance for the purpose of ousting the defendant who is alleged to be unlawfully holding and exercising the office. The cause being at issue on a traverse of the averments of relator's petition it was submitted to the court for trial without a jury under the act of 22d April, 1874, and its supplements, by stipulation of counsel filed May 4th instant. The trial thereupon proceeded, and from the evidence I find the following

FACTS.

1. How and when the borough of Old Forge was created is not shown. The case was tried on the assumption that before the inception of the cause it had been organized under the general borough laws and was governed accordingly at all times with which the case is concerned.

2. March 4, 1907, being the first Monday in the month, the annual reorganization of the town council was effected. Among other things, action was then taken for the appointment of a solicitor. As recorded on the minutes the action was as follows: "The next order of business was the election of borough solicitor. The following names were presented: John H. Bonner and W. A. Jennings. On roll call the following voted for J. H. Bonner," (the names follow.) "For W. A. Jennings" (the names follow.) "The result was as follows: Bonner 7, Jennings 3, John Bonner was declared the borough solicitor for the ensuing year."

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3. From that time until the first Monday of March this year the relator served as the attorney or solicitor for the borough. June 24, 1907, action was taken with respect to his salary. The minute of the action is as follows: "Motion of Patrick Burke that the borough solicitor's salary be $350 a year for his term. Motion carried." At the same meeting action was then taken with reference to the solicitor's bond. The minute is as follows: "An ordinance fixing the borough solicitor's bond at $1,000 a year was offered and passed final reading." The minutes of the meeting further show that his bond in that sum was accepted and filed.

4. The ordinance providing for the bond was recorded on the ordinance book and is as follows: "An ordinance fixing the amount of the borough solicitor's bond in the borough of Old Forge, county of Lackawanna and state of Pennsylvania. Be it ordained by the council of Old Forge, and it is hereby enacted by authority of the same, that in compliance with the act of assembly of 1907 requiring the borough solicitor to give a bond for the faithful performance of his duties the same be fixed at one thousand dollars."

The "act of assembly of 1907" therein referred to is the act of 25th April, 1907, P. L. 103.

5. This act is entitled a supplement to the general borough act of April 3, 1851, "providing for the election of a borough solicitor, fixing his term of office, and prescribing his duties, and authorizing the town council to fix his compensation."

Section 1 is as follows: "That the town council of each of said boroughs on the first Monday of March, 1907, or as soon thereafter as practicable, may elect, by a vote of a majority of the members, one person, learned in the law, who shall be styled the borough solicitor, and shall serve for the term of three years from the first Monday of March succeeding his election, and until his successor shall be duly qualified; and the town council shall also fix the compensation he shall be allowed for said term. Vacancies in said office shall be filled by the town council, for the unexpired term. He shall give bond to the corporation, with two or more sufficient sureties, to be approved by the town council, in such sum as they shall by ordinance direct, conditioned," etc. The remaining sections relate to the solicitor's duties.

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6. In connection with the record of the ordinance of June 24th in the ordinance book the clerk certified "that the foregoing ordinance was given to the burgess, Ed. Garvin, at least ten days before the next regular meeting, that he returned the same to the next regular meeting without his signature or his veto." Under the clerk's testimony it could be found that in respect to the action of the burgess the certificate is inaccurate, and thus the validity of the ordinance might be open to question. As the point is not essential to the proper disposition of the case we do not at this time undertake to decide it.

7. At the reorganization of the council the first Monday of March this year, the defendant was appointed borough solicitor for one year and from that time has been acting and recognized as such although he gave no bond, none being required by the council. At the meeting of March 23rd action was taken with reference to his salary as shown by the following minute: "Motion of Hapgood that the rest of the officers receive the same salary as last year, the officers being clerk, treasurer, solicitor and janitor. Motion carried."

8. Excepting the ordinance fixing the amount of the relator's bond in June, 1907, no action appears to have been at any time taken by the council with reference to the act of 25th April, 1907.

The defendant presented several requests for findings of fact but as they are substantially covered by the foregoing findings they need not be specifically answered.

As applicable to the facts I state the following:

CONCLUSIONS OF LAW.

1. At the time of relator's appointment the office of borough solicitor did not exist. His election was nothing more or less than an employment, the term of which expired by limitation on the first Monday of March, 1908.

2. The subsequent attempt to change the character of his appointment by merely requiring a bond in accordance with the act of April 25, 1907, P. L. 103, was of no effect.

3. Hence, the relator never took title to the office in question and for that reason cannot recover possession.

4. Whether defendant has any title to the office is at least questionable. But that need not now be decided, as the relator must recover, if at all, on the strength of his own title.

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5. Judgment should accordingly be entered for defendant with costs.

The defendant presented certain requests for conclusions of law which are practically covered by the foregoing, and more specific answers are deemed unnecessary.

DISCUSSION.

Prior to the act of April 25, 1907, there was no express legislative authority for the election of a borough solicitor. There was no statute either creating or recognizing such office. That the town council was clothed with implied power to employ an attorney by the year if in its discretion it saw fit, has never been doubted, and, indeed, would hardly seem to admit of a doubt. That, however, will not sustain the theory that the attorney so appointed became a public official, and his position a public office. Such office can only be created by the legislature or by municipal action in pursuance of express legislative authority. When the relator was appointed in March, 1907, he was at liberty to accept or reject an employment tendered him by the borough. Having accepted, he took it with the limitation annexed, namely, for the term of one year. That fixed the status of the parties to the appointment. The status wasn't changed by the act of April 25, 1907. It may, at least for the purposes of this case, be assumed that the effect of the act was to create the office of borough solicitor with a tenure of three years. The office, however, could only be filled by an election in pursuance of the act. That didn't pretend to make the borough attorney the incumbent of the newly created office. Neither does it purport to give the town council power to make him the incumbent otherwise than by election. Such election has never been held, unless the one of this year could be construed, which we do not undertake to decide. It is not sound legal reasoning to say that the subsequent ordinance requiring a bond from relator and fixing its amount was equivalent to his election under the act. Like all statutory proceedings, to be effective, the statute must be followed with substantial strictness. Here the statute wasn't in existence when the relator was appointed in March, 1907. There has been no attempt to rescind that action nor to proceed with another election until the end of the year for

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which the appointment was made. Then the defendant was elected. If the case turned on the validity of his title a different judgment might have to be rendered.

It may be the act doesn't make the election of a solicitor compulsory on the borough. But there is ground for the argument that if the town council sees fit to have a solicitor they must now elect in accordance with the act. The defendant is confronted with the fact that there was no attempt in his case to conform to the statute, but his appointment was apparently made on the theory that it is optional with the borough whether to elect according to the act or to appoint an attorney from year to year as heretofore. While we may have power to pass on the defendant's title, and, if neither party is found to have title, to declare the office vacant, we don't think the case is of such character as to call for that, and it is accordingly decided against the relator on the want of title in him. We cannot see how he has any standing to claim an office which didn't exist at the time of his appointment, especially in view of the limitation of his term of service to "the ensuing year."

Let judgment be entered for the defendant with costs unless exceptions be filed within thirty days after notice to the parties or their respective attorneys which is to be forthwith served by the prothonotary or his clerk as provided by the act of 22d April, 1874, P. L., 109.

A surety on an injunction bond given in a suit brought to restrain the enforcement of a judgment is held, in Stull v. Beddeo (Neb.) 112 N.W. 315, 14 L.R.A.(N.S.) 507, not to be released from liability thereon by the discharge of his principal in bankruptcy.

The measure of damages for the negligence of a bank in attempting to collect a check and in giving notice of dishonor is held, in Hendrix v. Jefferson County Sav. Bank (Ala.) 45 So. 136, 14 L.R.A. (N.S.) 686, to be the actual loss sustained, which the plaintiff must allege and prove; and, even under the doctrine of full prima facie liability, it is held that the bank cannot be held for the face value of the check when there are assets of the bankrupt bank on which it is drawn, and a 44 per cent dividend has been declared, and the payee is still the owner of the check.

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In the Court of Common Pleas of Lackawanna County, No. 900, September Term, 1908.

In Re: Triennial Assessment of Coal Lands in Lackawanna County for the year of 1907.

One of the fundamental principles underlying taxation for the support of government, state or municipal, is that all properties of the same class shall bear an equal part of the burden.

All taxes "shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

(*Provision in the Constitution of 1874.*)

The third section of the act of 1834 provides "that the assessors of the several wards, townships and districts shall, previous to each triennial assessment, assemble at the office of the commissioners of their respective counties and x x x shall proceed with the commissioners to fix on some uniform standard to ascertain the real value of all property made taxable by law, taking into consideration improvements, proximity to market and other advantages of situation, *so that the same relative valuation may be observed in every ward, township and district.*

While this section is repealed yet the legislation which supplants it is more specific, comprehensive and emphatic along the same lines.

The fourth section of the act of 1841, P. L. 394, directs the assessors to assess all objects of taxation "according to the actual value thereof," and at such rates and prices for which the same would separately *bona fide* sell;" and the same section provides that the commissioners may reduce the valuation if too high and raise it if to low. This legislation was one year before the board of revision and appeal was created.

By the act of 1842, P. L. 445, the oath to be taken by the assessors is prescribed. The same idea of equalization is found in the 13th section of the act of 1842, wherein the duties of the board of revision and appeal are defined. The legislature again in 1873, when it provided for an appeal to the court of common pleas, was careful to enjoin on the court the duty of equalization of assessment, "having regard to the valuation and assessment made of other real estate in the county," and "so adjusting the assessment complained of, that it shall be equal in proportion to its value, in all parts of said county, as may be."

The act of 1889, P. L. 37, on the same subject matter is similar in character. Under the organic and statutory law of the commonwealth, there cannot be one standard of valuation for Scranton, another for Carbondale and another for a borough or township.

The legislature lodged extensive powers in the county commissioners as such and as a board of revision and appeal.

There is no warrant in law for the assessing powers to a opt one standard of valuation of coal lands and another for surface.

There is no question of the powers of the commissioners to raise the valuation of coal when returned by the assessors provided that the valuation so raised is uniform with that of other property of the same class.

The vice of so called blanket rate is that it was made applicable to all the coal land in the county, regardless of conditions.

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A vein of coal in tract of land of such a quality as to yield fourteen hundred ton of marketable coal the foot-acre is worth more than a vein which yields eight hundred tons; that is, it is worth more in place. other conditions such as accessibility as a mining proposition and proximity to market being equal.

The difficulty with the evidence as to the tonnage per foot-acre is that it leads nowhere. The only question definitely settled by the evidence as to the yield per foot-acre is that a blanket rate applicable to all the coal in the county is impracticable and is unjust either to some of the coal owners or to the county itself.

According to the adjudicated cases it was settled that the witness giving opinion evidence as to the value of land, when examined in chief, cannot give the price of the sales upon which he bases his opinion; but it is also held that "such evidence may be brought out by the cross-examination of the witness."

Messrs. Willard, Warren & Knapp, Messrs. Wells & Torrey, Messrs. Watson, Diehl & Watson, Mr. James E. Burr, Mr. I. H. Burns, Mr. W. J. Hand, Mr. H. C. Reynolds, Mr. R. H. Patterson, Mr. Ralph W. Rymer and Mr. Charles L. Hawley, for appellants.

Mr. John J. Toohey, county solicitor, Mr. John P. Kelly and Mr. Clarence Balentine, for respondents.

Opinion by Edwards, P. J.

August 14, 1908.

Owing to the importance of the questions involved in the appeals from coal assessments recently heard by us, the majority of the court deem it proper to give at greater length than heretofore possible their views in support of the order made last month fixing the value of coal in place for assessment purposes at sixty dollars per foot acre.

One of the fundamental principles underlying taxation for the support of government, state or municipal, is that all properties of the same class shall bear an equal part of the burden. Two pieces of land, of equal value in the market, should pay the same amount of tax. It is true, as stated by one of the supreme court judges, that absolute equality is difficult of attainment, and that an approximate equality is all that can be reasonably expected; nevertheless, the principle stated is universally recognized and is to be found incorporated not only in statutory enactments but the organic law of the state.

The constitution of 1874 has this provision:

"All taxes shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

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This provision in the constitution of 1874 was not a new idea in the jurisprudence of Pennsylvania. The principle of fairness and equality in the distribution of the burdens of taxation is to be found in more than one statute previous to the time of the adoption of the constitution. (In 1834 the legislature passed a law relating to county rates and levies.) Some parts of this law are in force now. The third section of the act provides "that the assessor of the several wards, townships and districts shall, previously to each triennial assessment, assemble at the office of the commissioners of their respective counties and * * * shall proceed with the commissioners to fix on some uniform standard to ascertain the real value of all property made taxable by law, taking into consideration improvements, proximity to market and other advantages of situation, *so that the same relative valuation may be observed in every ward, township and district.*"

While this third section of the act of 1834 has been repealed by subsequent legislation, we refer to it in order to show the effort of the legislature to secure uniformity in the valuation of properties subject to taxation, so that the burden of taxation should be fairly distributed among all property owners; and we find that the legislation which supplanted the third section of said act is much more specific, comprehensive and emphatic along the same lines.

The fourth section of the act of 1841, P. L. 394, directs the assessors to assess all objects of taxation "according to the actual value thereof, and at such rates and prices for which the same would separately *bona fide* sell"; and the same section provides that the county commissioners may reduce the valuation if too high and raise it if too low. This legislation was one year before the board of revision and appeal was created. It will be noticed that the legislative direction to assess all property at its market value, with the power lodged in the commissioners to revise the assessments so as to secure uniform valuation throughout the taxing district, is only another effort on the part of the legislature to equalize the obligations of property owners to contribute to the public revenue.

This purpose becomes yet more apparent with the advance of legislation. By the act of 1842, P. L. 445, the oath to be taken by the assessors is prescribed. The assessor obligates himself to use

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his utmost diligence to discover all property in his district subject to taxation, and, to the best of his judgment, "to assess and value every separate lot, piece or tract of land, with the improvements thereon * * at the rate or price which he shall, after due examination and consideration, believe the same would sell for, if sold singly and separately at a bona fide sale, after full public notice."

The same idea of equalization is found in the thirteenth section of the act of 1842, wherein the duties of the board of revision and appeal are defined. The board is to examine the returns of the assessors and to inquire whether all property valued for taxation "has been valued at a sum or price not less than the same would bring after full public notice, at a public sale, supposing that each separate lot or piece or tract of land, with the improvement, * * * of each individual, company or corporation were to be sold."

The legislature again in 1878, when it provided for an appeal to the court of common pleas, was carefu' to enjoin on the court the duty of equalization of assessment, "having regard to the valuation and assessment made of other real estate in the county," and, "so adjusting the assessment complained of, that it shall be equal in proportion to its value, in all parts of said county, as nearly as may be." The act of 1889, P. L. 37, on the same subject matter is similar in character.

We have referred at some length to the several efforts of the legislature by successive enactments to impress upon assessors, boards of revision and courts, the desirability of equalizing the burden of taxation, so that each property of the same class, in the same taxing district, shall contribute its fair, equal share, no more and no less, to the public revenue. There should be no discrimination. Whether the property be coal or surface land and wherever it may be located in the county; whether it be a house and lot in Scranton, or Carbondale, or in a borough or township, each property must be treated alike. Under the organic and statutory law of the commonwealth, there cannot be one standard of valuation for Scranton, another for Carbondale and another for a borough or township.

It must be conceded that the great inequalities in the standards of valuation in various parts of the county, as disclosed by testimony, arises to a considerable extent from the weakness of the system which

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properties are assessed. Each assessor adopts his own standard of valuation; and when the returns of the assessor come in it soon appears that there are nearly as many standards of valuation as there are assessors. The better plan would be to have a board of five or seven assessors, elected by the people, or appointed by the courts, with power to assess all property in the county. The legislature, evidently impressed with the necessity of harmonizing and equalizing the work of the assessors so that the burden of taxation would rest alike on all properties, lodged extensive powers in the county commissioners as such and as a board of revision and appeal. In one capacity or the other, they have the power to raise, reduce, correct, revise and equalize the assessments, so as to secure the uniformity of valuation required by the constitution and the law. Yet, however zealous the county commissioners might be in the work of supervising the assessments, in a county as large as Lackawanna it is impossible for them to do justice to themselves or to the property owners in the county.

Whatever may be the causes that have contributed to the gross inequalities in the valuations for the triennial assessment of 1907 in Lackawanna County, it is our duty to make some comment on the fact found in the evidence, because they bear upon the final conclusion reached by the court in the appeals from the coal assessments. In our judgment we state the matter mildly when we say that the constitutional requirement as to uniform valuation and every act of assembly relating to the same question have been practically nullified. This is the result firmly established by the evidence. It is now immaterial that this result has been brought about by a poor system of assessing. We are concerned only with the fact of conceded inequality of valuations in various parts of the county.

1. THE INEQUALITY IN SURFACE VALUATIONS AND ASSESSMENTS.

During the progress of the hearing testimony was taken on the question of surface assessments. Taking the borough of Blakely as an instance it appeared that the ratio of the assessed to the actual valuation, as to some properties, was from ten to fifteen per cent. This appeared from the evidence of the appellants. It is reasonable to suppose that the evidence on the other side would raise this ratio.

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It also appeared that if we were to inquire into surface valuations all over the county, both sides giving evidence, the investigation would extend over several months. At the suggestion of the court and after consultation among counsel it was agreed that outside of the cities of Carbondale and Scranton the ratio of assessed to actual valuation of surface was twenty per cent. A similar agreement was reached as to the city of Carbondale. There the ratio was fixed at twenty-five per cent. Counsel could not agree as to the ratio in the city of Scranton, the appellants claiming it was not over thirty per cent. and the respondents claiming it was fifty per cent. For the purposes of the present discussion, let it be conceded that in the city of Scranton the ratio of the assessed to the actual valuation is fifty per cent. It will thus be seen that in the same county, or "within the territorial limits of the authority levying the tax", we have admittedly three standards of valuation, viz., in Scranton fifty per cent. of the valuation; in Carbondale twenty-five per cent., and in the townships and boroughs twenty per cent. A Scranton taxpayer may very properly ask: Why should a property in Scranton, worth $10,000, be assessed at $5,000, while a property of the same value in Carbondale is assessed at only $2,500? Or, in other words, why should the Scranton taxpayer, on a property of equal value, pay twice the county tax the Carbondale taxpayer pays? The same glaring inequality is more pronounced when the Scranton valuations are compared with those of the townships and boroughs. Why should the owner of a property in Scranton pay two and one-half times the tax paid on a similar property in a borough or township? How does this method of assessment conform to the constitutional requirement of "uniform valuation", or to the provisions of the several acts of assembly relating to county assessments? The requirement of uniform valuation is not met by a mathematical equation, involving as factors the total sums of the assessments in the city of Scranton, and in the city of Carbondale, and in the townships and boroughs, together with the several ratio percentages. The answer to the equation is of no value. It appears that, in round numbers the surface assessments in Scranton amount to $29,000,000; in Carbondale, $2,000,000; in the boroughs and townships, $10,000,000. Considering the several elements of the problem, it might be said that

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the average ratio of the assessment of surface to actual valuation in the whole county is thirty-five per cent.; but the premises and the whole equation are fallacious as elements to sustain a judicial conclusion. If twenty-five per cent. is the proper ratio to actual value in Carbondale, it is the proper ratio in Scranton; or, if twenty per cent. is the proper ratio in the townships and boroughs, it is the proper ratio in Carbondale and Scranton.

The question of surface valuation and assessments has been discussed by us at some length, because it bears a close relation to the valuation and assessments of coal lands, as will be seen hereinafter.

2. COAL ASSESSMENTS COMPARED TO SURFACE ASSESSMENTS.

We have already shown the inequalities in surface assessments in various parts of the county. We find the same kind of inequality, but to a greater extent, between the valuation of coal and surface, when compared one with the other. The county commissioners adopted a blanket rate of $200 per foot-acre as the average market value of coal in place throughout the county. Although we hold, under the evidence, that this valuation is too high, and that $150 is a fair average market value per foot-acre, let it be conceded for the present that $200 per foot-acre is correct. For assessment purposes the commissioners fixed the rate at $100 per foot-acre, or, fifty per cent. of the market value. According to the tabulations submitted to us, over sixty per cent. of the coal land in the county is located in the boroughs and townships, where the ratio of surface assessments to actual value is only twenty per cent. We thus have the anomaly of two rates of assessment on the same kind of property in the same borough or township. The surface is assessed at twenty per cent. of its value; the coal under the surface at fifty per cent. of its value. The mere statement of this fact shows a practical nullification of the constitutional requirement and all statutory provisions relating to county rates. As an illustration of the injustice resulting from this condition of things, let us say that in one of the boroughs there is a tract of land containing 100 acres. The tract is underlaid with coal. The surface belongs to one person, the coal to another. The fair market value of the surface is $10,000; the fair market value of the

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coal at $200 per foot-acre is $50,000. What is the assessment? The surface is assessed at $2,000, one-fifth its value, and the coal at $25,000, one-half its value.

It is useless to continue this line of discussion. It is evident that the assessing powers adopted one standard of valuation for coal lands and another for surface, and that there is no warrant in law for such discrimination. In fixing the assessment of coal at the rate of $60 per foot-acre we endeavored to correct the inequality as far as possible. The result has been just as unsatisfactory to us as it has been to the parties on both sides of the controversy.

3. THE ASSESSMENT OF COAL BY THE FOOT-ACRE.

This was done by resolution of the county commissioners. The value of a foot-acre was fixed at $200, and the assessment at $100. There is no question of the power of the commissioners to raise the valuation of coal when returned by the assessor, provided the valuation so raised is uniform with that of other property of the same class. The vice of the so-called blanket rate is that it was made applicable to all the coal land in the county, regardless of conditions. We had not progressed very far in the hearing of the appeals when it became clearly apparent that such a method was not warranted by law. The act of assembly says that each property must be assessed separately, individually, at its actual value and at such a sum as it would bring at public sale after due notice. It did not require much evidence to prove that a blanket or uniform rate for every foot-acre of coal in the county was not only unjust and inequitable, but illegal. After consultation with counsel and for the purpose of meeting the exigencies confronting us in the hearing of appeals from several hundred assessments, the appellants agreed to waive their right to have every coal property assessed separately at its individual value, and consented that the court should adopt for the purpose of fixing a value of coal lands a uniform average rate per foot-acre of all coal which could be mined at a profit. It was under this agreement that the appeals were heard, and there was nothing before the court but this question of a uniform average rate per foot-acre, the parties having agreed almost wholly as to the quantities of minable coal in the several properties assessed. Let it be understood that we do not condemn the foot-acre method of arriving at the value of a spe-

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cific tract of coal land. The assessor may use this method or any other that appeals to his judgment. It is the attempt to apply a uniform rate to every foot-acre of coal in the county that we condemn.

We shall now consider the kind of evidence offered to enlighten the court and to enable it to reach a satisfactory conclusion. Most of the testimony came from mining engineers. Much of it related to the yield in tons per foot-acre. The engineers were in substantial accord as to the number of tons contained in a foot-acre of coal. They fixed it at 1800; but they differed very much as to the average yield in tons per foot-acre that could be mined. Without going through the testimony, our recollection is that the estimates ranged from 800 to 1400 tons and in some exceptional cases a still higher yield was given. While this method of proving the value of coal land is not the standard of value recognized by the courts; yet, when ascertaining the worth of a foot-acre of coal in the ground the probable yield in tons is an important factor to be considered by the purchaser and the seller. A vein of coal in a tract of land of such a quality as to yield 1400 tons of marketable coal to the foot-acre is worth much more than a vein which yields only 800 tons; that is, it is worth more in place, other conditions such as accessibility as a mining proposition and proximity to market, being equal. The difficulty we find with the evidence as to the tonnage per foot-acre is that it leads us nowhere. There is no definite testimony as to the net profit on the coal mined throughtout the county, after making allowance for costs of mining and preparation for market, cost of transportation, and all other expense connected with the mining and selling of coal. It is true that throughout the testimony there are many references to the various items of cost mentioned; but it is impossible from the data submitted to reach any satisfactory conclusion as to the average value of coal in place in the county based on the average yield per foot-acre, conceding that we could ascertain such average from the evidence in the case. We say in conclusion, on this phase of the controversy, that if all the factors were before us, we could work out a reasonably correct equation and thus fix the value of coal in place according to this method of proof, but further discussion on this point is unnecessary. The only question definitely settled by the evidence as to the yield per foot-acre is that

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a blanket rate applicable to all the coal in the county is impracticable and is unjust either to some of the coal owners or to the county itself.

The second branch of the evidence relates to the current market rates of royalty for coal prevailing in Lackawanna County. Whether we look at the matter from the standpoint of the owner who has not yet leased his coal, or of the lessor who has leased it, or of the lessee who is mining the coal on a royalty basis, it is undoubtedly true that the royalty paid is an important consideration and affects the value of coal in place. Nevertheless, we could not arrive at any conclusion on the basis of royalty as to the value of coal per foot-acre. There are too many uncertain factors brought into the equation. The evidence as to royalty opened the door to many conjectures, such as the probable life of coal mining in the county, the rate of the *decrease* of production of coal in the future owing to the exhaustion of the veins and the probable greater difficulties of mining, or, as some claim, the probable *increase* of production in the near future owing to new and improved methods of mining—these, and many other problematical questions have been presented to us. It is a well known fact that there are thousands of foot-acres of coal in Lackawanna County that will lie in the ground unmined for the next thirty or forty years. Using this as a basis, some of the engineers on the witness stand explained that the royalty, say forty cents per ton, to be paid on one ton of coal thirty years hence, should be calculated, in arriving at its present value, on the basis of its present worth. However important this feature of the evidence may be under some circumstances, it is of no probative value in ascertaining the present value, for purposes of taxation, of a foot-acre of coal in the ground.

Having discarded the two branches of the evidence relating to the yield in tons per foot-acre and to the royalty rate, there is nothing left but opinion evidence based on the knowledge of sales in the open market and the prices at which coal lands are held. We agree with our learned colleague, Judge Newcomb, who in his dissenting opinion cites several authorities sustaining the proposition that the only way to prove the value of land is by opinion evidence of the character stated, and we refer to the cases cited by him. Nevertheless, it is well known that such opinion evidence is a low quality of proof. One of the justices of the supreme court has said so very

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emphatically in one of the reported cases; but he said also that it was the best order of proof known to the law. There is no question about which there is such wide divergence of opinion as that of the value of property, and the case at bar illustrates this point. The question to be answered was: What in your opinion is the average market value of a foot-acre of coal land in Lackawanna County? More than a dozen competent mining engineers tried to answer the question. They differed extremely, from $30 per foot-acre, the lowest estimate on one side, to $345 per foot-acre, the highest estimate on the other side. It is no wonder that such opinion evidence has been designated by the supreme court as a "low order of proof."

It is claimed on the part of the respondents that their experts are the only witnesses who based their opinions on their knowledge of sales and the selling prices of coal land in this county. This may be so. According to the adjudicated cases it is settled that a witness giving opinion evidence as to the value of land, when examined in chief, cannot give the particulars of the sales upon which he bases his opinion; but it is also held that "such evidence may be brought out by the cross-examination of witnesses." The cross-examination of respondants' engineers weakens very much the weight to be given to their opinions as to the value of a foot-acre of coal. They testified that they knew of a number of sales of coal in place; but, as far as we can recall now, there was hardly an instance where other circumstances and conditions besides the value of coal itself did not enter largely into the transaction. in one case a large price was paid for a strip of coal bought by a railroad company to support its right of way. A very substantial price was also paid for a few acres of coal by a mining company because the coal could be reached without the expense of shafts and the gangways and headings already opened. Other large sales such as that of the Pennsylvannia Coal Company to the Erie Company (this being the name designated in the evidence), the Lackawanna Iron and Steel Company to The Scranton Coal Company, the sale of the Oxford Colliery and the sale of the National Colliery, as well as others were so connected with other conditions than the coal itself, such as vast improvements, shafts, slopes, openings and transportation interests, that any opinion

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based on the knowledge of these transactions or sales is of little value to enable us to ascertain the average value of a foot-acre of coal in place. We think the evidence of the sale of a tract of coal land in Luzerne County, containing 61 feet of coal, undeveloped, is the best instance given of the price paid for coal in place unhampered by extraneous conditions and as a purely mining proposition.

We have discussed the opinion evidence for the purpose of showing its unsatisfactory character as well as the difficulty of fixing a fair assessment rate per foot-acre in the County of Lackawanna.

In our order of July 13, 1908, the majority of the court fixed the sum of $60 as the assessment rate per foot-acre of coal in the county. Since handing down the order, our attention has been called to what is termed by appellants' counsel as "clear error". We stated in the order that the average ratio to actual value of surface assessments is forty per cent. We based this conclusion on a tabulation of surface assessments submitted to us by respondents. It appears now that this tabulation included personal property. In a strict and technical sense the criticism of appellants' counsel is justified. The corrected tabulation would reduce the ratio of surface assessments to about 35 per cent. of the actual value, and we are asked now to change the assessment rate per foot-acre accordingly. We decline to do this, because we are not disposed to treat the question along mathematical lines. The problem submitted to us should be considered on broader grounds.

We therefore re-affirm the order of July 13, 1908, fixing the assessment on coal per foot-acre throughout the county at sixty dollars.

In closing this discussion, we desire to state that the parties on both sides, appellants and respondents, through their counsel and engineers have given us material assistance in the work of disposing of the appeals. Had it not been for the successful efforts of all parties concerned to agree on the quantity of minable coal in the county, we apprehend that the judges would have to sit hearing the appeals for several months longer.

A traveler about to cross a drawbridge is held, in Anne Arundel County v. State (Md.) 68 Atl. 602, 14 L.R.A.(N.S.) 452, to be bound to stop, look, and listen.

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In the Court of Common Pleas of Lackawanna County, No. 900 September Term, 1908.

In Re: Triennial Assessments of Coal Lands in Lackawanna County for the year 1907.

There is as much variance in coal as there is in surface lands and an attempt to assess at a flat rate is illogical.

The true measure of values is the price of coal in place, ascertained from knowledge of sales in the county.

The statutes of 1841 and 1842 require each piece of land to be assessed at the actual value or price, as nearly as it can be ascertained, at which it would separately sell at a bona fide sale after full public notice.

The measure of value in cases where the market value of land is the question at issue is "the price usually given for such land in the neighborhood, making due allowance for difference of position, soil and improvements."

An attempt to deduce the value of an acre of coal from its estimated yield stands condemned by both reason and authority.

The burden of proving an assessment to be excessive rests with the party making the claim. The presumption is in favor of the official assessment which is entitled to stand until overcome by the weight of competent evidence.

Messrs. Willard, Warren & Knapp, Messrs. Welles & Torrey, Messrs. Watson, Diehl & Watson and Mr. James E. Burr, Mr. I. H. Burns, Mr. W. J. Hand, Mr. H. C. Reynolds, Mr. R. H. Patterson, Mr. Ralph W. Rymer and Mr. Charles L. Hawley, for appellants.

Mr. John J. Toohey, County Solicitor and Mr. John P. Kelly, Mr. Clarence Balentine, for appellees.

Opinion by Newcomb, A.L.J. (Dissenting.)

July, 1908.

I regret my inability to agree with the action of the court in reducing the valuation of coal land in this county to sixty dollars per foot-acre. The attempt to assess at a flat rate is illogical. There is as much variation in coal as in surface lands. But the flat rate in itself presented no difficulty with respect to the proper method of trial after the cases came into court. Each appeal raised a specific question as to the value of the particular tract which it covered. Nothing could be better calculated to obscure the true question thus raised than the method by which the parties were permitted to testify. It is noted in the majority opinion that the appellants put on record their waiver of the right to have each property separately assessed, etc.

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From their standpoint they might well do that as it served to form the basis upon which they were permitted to inquire, not as to the value of any tract in particular, but wholly at large and in the abstract, what is the average value of all the coal in the area of seventy-one square miles in this county? It is further said in the opinion that, "proceeding on the basis of this agreement a vast amount of expert testimony was offered on both sides. It is somewhat of a surprise to us to find such extreme diversity of opinion among mining experts as to the value of a foot-acre of coal in place. The estimates of value on one side run from $30 to $50 a foot-acre; on the other from $200 to $345 a foot-acre; and these figures, in the opinion of the experts, represent the average value and not the variations in value incident to the relative worth of individual tracts of coal land."

Reference to the testimony and the appellants' written argument shows the source of this disagreement, and exposes the utter failure of the appellants' case. It must be borne in mind that the question at issue was the value of land as land. The appellants' experts deduced their valuation of $30 to $50 from an estimated yield of marketable coal to be produced from an average foot-acre on which they calculated the present worth based upon the length of time to be covered by the assumed duration of mining or period of production. To the man of average intelligence it must be apparent that the market value of a tract of coal land which may be mined out within an uncertain and indefinite time in the future cannot be ascertained in that way. As a measure of such value it is manifestly too uncertain, speculative and contingent to be entertained. It is contrary to the plain requirement of the statute. That is not all, it has been distinctly negatived by our Supreme Court.

The experts on the part of the county, or at least some of them, based their figures on their knowledge of sales of coal in place in this county. This is the true measure.

The statutes both of 1841 and 1842 reqnire each piece of land to be assessed at actual value or price as nearly as it can be determined, at which it would separately sell at a bona fide sale after full public notice. In other words, the lands in question are put by law within the definition of market value. Such definition is always based upon

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a value fixed by what the property would sell for at some kind of a sale, either public or private; not a forced sale, but one where the seller has control of the terms and conditions of sale.

10 Am. & Eng. Enc. Law, (2d Ed.) 1152.

We turn them to what the highest court of this state has held to be the measure of value in cases where the market value of land is the question at issue.

Searle vs. R. R., 33 Pa., 57. There was an offer to prove the value of the land by showing the value of coal therein contained. The offer was rejected and assigned for error. In affirming the judgment, the Supreme Court said the true measure of value is "the price usualy given for such land in the neighborhood, making due allowance for differences of position, soil and improvement. Value may be very approximately estimated in that way for it is not then founded upon the fact of a general market value." Discussing the reason of the rule it was there further said: "The plaintiff has been allowed the full value of the land, as estimated by the common standard; and we do not see how we can take any other. The one here proposed has never been publicly sanctioned, and that is something against it. It would require us to ascertain the value of the products of the land in order to get at the value of the land itself. But the products do not exist and therefore have no value, for value here means value in money in the market, and this cannot apply to products not yet in existence. And then to use products as a standard of value of the land, is to apply an uncertain measure in order to obtain a certain result. Moreover, the offer impliedly requires a degree of refinement in the measure of values which seems to us totally incompatible with the gross estimates of common life. Though we might have the most accurate calculation of the quantity of coal in the land, yet, without knowing exactly the expense of bringing it to the surface and carrying it to market, and the amount likely to be lost in mining and conveying, the times in which it would be brought out, and the market prices at those times, the quantity would not help us to value the land. The gross estimates of common life are all that courts and juries have skill enough to use as a measure of value. All other measures are necessarily arbitrary and fanciful."

This was affirmed in R. & P. R. Co. vs. Balthaser, 119 Pa., 472,

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where the court below was reversed for allowing an estimate of the value of land based upon its probable yield of limestone. The supreme court said: "It is almost unnecessary to argue the incompetency of that kind of testimony. Its character and effect were fully pointed out in the opinion of this court in Searle v. R. R. Co., 33 Pa., 64." It was again affirmed in Becker v. R. R., 177 Pa., 252. The same thing in effect was reiterated no longer ago than January, this year, in Baker v. R. R. Co., 219 Pa., 398.

Thus the attempt to deduce the value of an acre of coal from its estimated yield stands condemned by both reason and authority. In this case the appellants had the burden of proving the assessment to be excessive. This they failed to do by the opinions of competent witnesses based on sales in the county. That of itself, according to inflexible rules applied to all other law suits, was decisive against them so far as concerned the intrinsic valuation. This, because the presumption is in favor of the official assessment, which is entitled to stand until overcome by the weight of competent evidence. So far as there was competent evidence it was on the side of the county, and went to strengthen the legal presumption.

In that state of the record we now have the anomalous result that without pleadings or proofs to sustain it, judgment has gone in the affirmative of the issue against a presumption of law and evidence on that side tending to sustain the negative.

On this branch of the case there is no ground for substantial difference. The dispute as to surface is confined to the city of Scranton. The general ratio for the county might vary a little according to the precentage as found in the city. The weight of the evidence is clearly in favor of the commissioners' claim of 50 per cent. in this city unless several groups of transfers introduced by the appellants be taken into account. They should not be considered because such evidence is held to be incompetent.

Becker v. R. R. Co., 177 Pa., 252.

It was accordingly so ruled against the county in this proceeding when the commissioners offered to prove specific sales of coal land.

Whether considered or not, I am willing to concede that 40 per cent. as found by the court is the precentage of valuation of surface,

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taking the county altogether. Accordingly I would reduce the coal assessments to that ratio and fix it at $80 per foot-acre. To my mind the reduction to $60 is quite arbitrary. It can be reconciled neither with the valuations on the one side deduced from the estimated yield, nor with those on the other based on known sales. Hence, it would seem to have been adopted as some vague sort of compromise figure. But the apparent conflict presents no case for compromise. That can only be justified as between divergent opinions on the same subject matter. Here the opposing witness didn't speak of the same thing. They approached the subject from two essentially different standpoints, one of which has the advantage of statutory and judicial sanction, while the other has been distinctly repudiated by the courts. On the one side a calculation is given of the present worth of an estimated yield of coal, the production whereof is assumed to be strung out over an estimated number of years; on the other an opinion of the market value of land, as land.

With the highest regard for the learning of my colleagues the case is confidently believed to have called for nothing except the application of familiar rules of practice touching the burden of proof and the competency of the evidence as in the trial of any other cause.

Service of summons on the joint soliciting agent of a domestic and a foreign corporation running connecting trasportation lines, contract being regularly made by the domestic corporation for and in the name of the foreign corporation, is held, in Central R. Co. v. Eichberg (Md.) 68 Atl. 680, 14 L.R.A.(N.S.) 289, to be sufficient to bind the latter, under statutes authorizing suits against foreign corporations doing business within the state by service upon their agents therein.

A suitor going to, attending, or returning from, court for the purpose of the case to which he is a party, is held, in Barber v. Knowles, 77 Ohio St. 81, 82 N. E. 1065, 14 L.R.A.(N.S.) 663, to be privileged from service of summons while so going, attending, or returning, and whether he be a resident or nonresident of the state.

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In the Court of Common Pleas of Lackawanna County, No. 10 March Term, 1908.

Equity

Demurrer to Plaintiff's Bill.

John McCabe, et. al. vs. W. G. Scurry, et. al.

The question was whether the defendants were properly joined.

Plaintiffs joined in a suit to compel the abatement of a nuisance common to all persons resident in their neighborhood. The nuisance consists of noxious and offensive orders and gases given off from a mine fire involving the surface as well as the coal strata and old workings underlying a tract of land adjacent to the streets on which the plaintiffs have their homes, thus depriving them of a comfortable and healthful enjoyment of their property.

The court held that it had no hesitation in holding that the exisetnce of a continuing nuisance was sufficiently shown by the bill.

Previous to 1901 the lands described in the lease where the fire is burning appears to have been held by three owners as tenants in common. In 1901 one of the owners died. By his will he appointed three executors "with power to sell, transfer and convey any real estate of which he might die seized". It further appears that before the filing of the bill in this case two of these executors died and that but one of the owners survives. In 1903 a lease, demising by terms usual in such instruments in this locality "all the coal upon and under the land mentioned", etc. was made to the lessee. This lease effects a severance and, as to the coal, passes the title and possession completely to the lessee.

Held: That if it was the coal to which reference was made in the bill in saying that the executors "succeeded to the management and control of said real estate" it is an unwarranted conclusion and not well pleaded.

The liability of the lessor would depend on the question whether the nuisance existed there at the time the lease was made.

For damages to third persons, from a defect in the demised premises amounting to a nuisance, liability is presumptively on the occupier. If the defect exists at the date of the demise and is a continuing nuisance the landlord is liable. So far as concerns the surface fire the lease would not in any event affect the *prima facie* liability of the owners. As to the surface, possession is presumed to be in the owners. The principal liability is to be found in the law of negligence and it is presumptively the negligence of the party in possession.

The further presumption is that executors have nothing to do with the real estate and that they are not in possession. They cannot commit a tortious act at the expense of the estates which they represent.

Held: That the demurrers were well taken as to those defendanats who are used as executors.

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Messrs. Grambs & Horton and Messrs. Vosburg & Dawson, for plaintiffs.

Hon. John P. Kelly and Mr. H. C. Butler, for executors.

Opinion by Newcomb, A. L. J.

April 27, 1908.

The Finn Coal Company filed a special demurrer. The other defendants answered separately but each by the last paragraph of his answer took defense by way of general demurrer as provided in Rule 37. It was then agreed that argument be had in order that the questions thus raised be first disposed of as if upon formal demurrers by all the defendants. Since the argument the plaintiffs, after notice to defendants, made a motion to amend by filing three additional paragraphs which will be allowed.

The plaintiffs join in the suit to compel the abatement of a nuisance common to all persons resident in their neighborhood. The nuisance at present consists in noxious and offensive odors and gases given off from a mine fire involving the surface as well as the coal strata and old workings underlying a tract of land adjacent to the streets on which the plaintiffs have their homes, thus depriving them of the comfortable and healthful enjoyment of their property. The origin of the fire is undisclosed, except as it is said in the fourth paragraph of the bill to have "developed on and before 1901." It is now alleged to be spreading, becoming dangerous, and a menace to the safety of the plaintiffs' properties by threatening eventually to involve the surface support under their dwellings. No hesitation is felt in holding that the existence of a continuing nuisance is sufficiently shown by the bill. Neither can we see any reason why the plaintiffs do not show a *prima facie* right to join in the suit. The difficulty is with the question whether the defendants are properly j oined.

Recourse may be had to the record of the lease mentioned in the second paragraph of the bill to determine in some measure their respective relations to the subject matter of the suit.

Previous to 1901 the land described in the lease, where the fire is burning, appears to have been held by three owners as tennants in common, viz., W. W. Watt, J. E. Watt and Daniel Scurry. In June, that year, J. E. Watt died. It is recited in the lease that by

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his will, thereafter probated in this county, he appointed Daniel Scurry, William E. Watt and Martha B. Watt as his executors "with power to sell, transfer and convey any real estate of which he might die seized." It further appears that two of these executors are now dead and that the other, William E. Watt, one of the defendants, survives. What interest or estate he may have in the land is not disclosed, except as it is vaguely said in the first paragraph that: "The ownership of said real estate consists of three equal undivided interests vested in the parties above mentioned as to the surface and the coal underneath the same." The lease was made January 3, 1903. It was executed on part of the estate of J. E. Watt by his executors ostensibly under their testamentary power, jointly with the other two owners. In the meantime Daniel Scurry, one of the latter, has died. The disposition of his share in the property is not shown. But coupled with the above general averment as to "the ownerahip of said real estate, etc." it is alleged that since his death "his executors, W. G. Scurry and Belle Scurry, succeeded to the management and control of said real estate"; and a like averment is made as to William E. Watt, executor of J. E. Watt.

On this showing the surviving lessors, W. W. Watt in his own right, and William E. Watt in his right as executor, are joined as defendants with the personal representatives of the other lessor in their right as executors and with the lessee.

The lease diemised by the terms usual in such instruments in this locality "all the coal upon and under the land mentioned, etc., * * * comprising about fifty acres, more or less, except the coal under Clark avenue, with the sole right to mine and remove said coal until all merchantable coal has been mined and removed from said premises. Together with the right to occupy for mining fixtures, and for any purpose connected with the mining of said coal, all of the surface of said lands, except the land covered by a culm pile," etc. This is coupled with a correlative covenant on part of the lessee "to mine and remove all of the merchantable coal * * * which can by the use of due diligence be mined and removed." The lease was made to Finn and Roderick but by paper of the same date was assigned to the Finn Coal Company which went into possession of the premises under the lease and has been conducting mining

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operations there ever since.

Needless to say that this effected a severance and, as to the coal, passed the title and possession completely to the lessee.

Sanderson v. Scranton, 105 Pa., 496.

If then it was the coal to which reference was made in the first paragraph of the bill in saying that the executors "succeeded to the management and control of said real estate" it is an unwarranted conclusion and not well pleaded. But by one paragraph of the amendment it is explained that it is the coal company that is alleged to be in control of the coal, and that the surface is controlled by the other defendants.

Disregarding for the moment the status of an executor, the question whether the relation between the defendants is technically that of grantor and grantee or landlord and tenant would make no difference if the fire involved nothing but the coal. The liability of the lessor would depend on the question whether the nuisance existed there at the time the lease was made. For damages to third persons from a defect in the demised premises amounting to a nuisance liability is presumtively on the occupier. If the defect exists at the date of the demise and is a continuing nuisance the landlord is liable.

1 Thompson's Negligence, sec. 1154–6.
Knauss v. Brua, 107 Pa., 85.
Fow v. Roberts, 108 Pa., 489.
Wunder v. McLain, 134 Pa., 134.

The same principle has been applied to a grantor. In well considered cases it has been held that having created a nuisance by a structure on his premises he could not escape liability to third persons by selling the property.

Plumer v. Harper, 3 N. H., 88.
Curtice v. Thompson, 19 N. H., 471.
Easton v. Mfg. Co., 44 N. H., 143.
Staple v. Spring, 10 Mass., 72.
Light Co. v. Porter, 167 Ill., 276.

There is no reason why the same rule would not be applied where a nuisance of casual origin was negligently suffered to remain on the premises. The presumption being that it is the occupant who

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is liable, it would be necessary to overcome it by averring the existence of the nuisance on the demised premises when the lease was made in order to hold the lessor. Such averment is not distinctly made here. At most it is only suggested by saying that "a mine fire developed on and before 1901." That may be capable of amendment and if desired we would be disposed to give plaintiffs an opportunity to be heard on that question.

But regardless of that, according to the bill the fire involves the surface as well as the underlying coal. As to the surface, possession is presumed to be in the owners. That is not overcome by the terms of the lease which give the lessee a license to use the surface for certain purposes without divesting the owner's possession. So far then as concerns the surface fire the lease would not in any event affect the *prima facie* liability of the owners. But by any fair intendment it is physically all one fire. As amended the bill avers that it can only be abated by concurrent work on both the surface and the coal strata below. We cannot see how that could be otherwise. Both owners then must be presumed to owe a duty to the plaintiffs, each with respect to his own estate. These are so physically connected that it is not apparent that the injury to which both contribute can be practically abated save by concurrent action. Surely if they owned adjoining lots and erected a public nuisance over the division line there can be no reason why they would not be jointly liable. So if instead of creating the nuisance they suffered it to continue in such location where it had developed casually there is no rational ground for compelling an injured third party to sue them separately.

This reasoning, if sound, would support a joint action as against the coal company and W. W. Watt, one of the tenants of the surface. But what about the other defendants who are sued as executors? True, one of these, William E. Watt, is a party to the lease. That, however, didn't make him a co-tenant in possession. The only authority asserted by him in making the lease was the power to convey as executor under the will of J. E. Watt. That doesn't even imply a tenancy. The other executors represent a deceased party to the lease. The only averments as to any interest in either of the parties so sued aside from that in the first paragraph above quoted is found in the amendment, to wit: "The surface is owned by and

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under the control of the several defendants, except the Finn Coal Company," etc. This is vague and ambiguous. Was it meant to say that they held title in their own right or only as executors? Are they in actual possession as tenants or have they only such control as might be necessary to enable them to carry out the provisions of their testator's will, as to which there is no disclosure? Did they take title by will or only the power to dispose of the realty in order to settle the estate as directed by the testator? Answers to these questions cannot be found in the averments of the bill beyond the mere recital in the lease of the power in the executors of J. E. Watt to convey. If the latter had committed a tort in his lifetime his estate might be responsible. But that doesn't affirmatively appear. If it did so appear it by no means follows that his personal representative could be called upon to abate nuisance arising from a defective condition of real estate. The same is true as to the estate of Daniel Scurry, one of the former owners. For the principle of liability is to be found in the law of negligence. As already noted it is presumtively the negligence of a party in possession. The further presumption is that executor shave nothing to do with the real estate and that they are not in possession. There is nothing here to overcome that presumption. If they have been inpossession of the surface in their own right they can only be called upon to answer on that basis. So, whether they are in possession of the surface as executors, or in their own right, the tort, if any, since their succession is their own. They cannot commit a tortious act at the expense of the estates which they represent.

It follows that the demurrers are well taken as to those defendants who are sued as executors, and, from what has been said, the other two defendants are believed to be properly joined. The demurrer of W. W. Watt and the Finn Coal Company are overruled; as to the defendants, W. G. Scurry and Belle Scurry, executors, etc., of Daniel Scurry, deceased, and William E. Watt, executor, etc., of J. E. Watt deceased, the demurrers are sustained. Upon the cause being put at issue it will be further heard *sec. reg.* The prayer of the bill is for affirmative relief by mandatory injunction and a preliminary writ is asked for. That we cannot grant until the plaintiffs' right shall have been established on final hearing.

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In the Court of Common Pleas of Lackawanna County, No. 15 May Term, 1908.

Equity.

Rule to Continue Preliminary Injunction.

Erie Railroad Company and Erie & Wyoming Valley Railroad Company vs. The Borough of Dunmore, et. al.

The Act of June 7, 1901, P., L., 531, prohibiting grade crossings, except they are allowed by court, does not apply to streets laid out previous to the passage of said act.

The action of a borough in ordaining the grading of an avenue, although a small part of it was omitted from the terms of the ordinance, is a distinct acceptance for public use of the whole of the avenue as plotted and dedicated. Any public use of a part of a property, indicating the purpose to accept the gift, fixes the public right to the whole; and when the public right has been acquired it cannot be lost by nonuser.

Messrs. Willard, Warren & Knapp, for plaintiffs.

Mr. R. A. Zimmerman, borough solicitor and Messrs. O'Brien & Kelly, for defendants.

Opinion by Edwards, P. J.

August 18, 1908.

Plaintiffs' bill alleges that the borough of Dunmore is establishing and constructing a grade crossing on Jefferson avenue where the plaintiffs' railroad crosses said avenue, without first obtaining premission to do so from the court of common pleas as provided by the act of June 7, 1901, P. L. 531; and the bill prays for a restraining order, as well as for a mandatory injunction on the borough to undo the work already done.

In order to preserve the *status quo*, a preliminary injunction was issued and the borough officials were restrained from proceeding further with the work.

There is no agreement that the case should be heard as if on final hearing. It is before us on a rule to continue the preliminary injunction. Nevertheless, it appears to us that the case has been fully heard on both sides as if it were before us on final hearing. For this reason, we shall decide the case on its merits, making findings of fact and law as fully as if the case were at issue by bill, answer and replication.

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We think it is proper for us to state, in a preliminary way, that taking the evidence as it is now before us, were the borough applying for premission under the act of 1901 to establish a grade crossing at the point in dispute, we would feel constrained to refuse such premission. We make this statement without prejudice to the rights of either party.

From the evidence before us, we find the following

FACTS.

1. Jefferson avenue has been a part of the Meylert plot of ground, where the crossing in dispute in this case is located, since 1868. The plot of ground was duly recorded; lots were sold in the block which includes the disputed point, from time to time, with reference to the plot and to Jefferson avenue as a boundary, and the right of way for plaintiffs' railroad was secured by the purchase of lots bounding on said avenue. These facts appear clear, not only from the testimony of witnesses but from the following agreement:

"It is agreed that A. N. Meylert was the owner of a plot of grouud which included the point in dispute here in 1868, and that in that year he plotted it out into lots with reference to streets and avenues, and that the plot showed Jefferson avenue for two blocks which included the block where the disputed point is; that the plot was duly recorded in Luzerne County, and that subsequently thereto the owners sold lots upon this plot and upon the block of Jefferson avenue which includes the point in dispute to divers persons and sold with reference to the avenue as a boundary and with reference to the plot; that the right of way of the plaintiff company was purchased by it in 1886 or thereabouts by the purchase of certain lots upon this block in question with reference to Jefferson avenue; that the plaintiff purchased no right of way across the street or avenue; that at the present time James A. Lansing and A. C. Fuller are the owners of one of the lots, to wit, the lot on the northwesterly corner of New York street and Jefferson avenue in this block in question; that some six or seven lots are owned by another party or parties whose names we do not now know or cannot now agree to, and that the balance of the block is owned by the plaintiff company by purchase either from the original owner, who made the plot, or from his grantee."

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In view of the evidence and of the foregoing agreement we find as a fact that Jefferson avenue was unquestionably dedicated to public use long before the plaintiffs' railroad crossed it at grade.

2. Nor can there be any question as to the acceptance by the borough of Jefferson avenue as a public street. This is proven by work done on a part of the avenue by the borough, and by the odinance of 1892 providing for the grading of Jefferson avenue between the intersection of the railroad with the avenue near Marion street and the intersection of the same avenue by the same railroad near Larch street, an estimated distance of about 1200 feet. The railroad in going from Scranton to and through Dunmore has several curves. It crosses Jefferson avenue at grade near Larch street and it thus makes a sweeping curve crossing New York street above grade and coming back to Jefferson avenue crossing it at grade at a point about 100 feet from Marion street, the distance, as stated, between the two Jefferson avenue crossings being about 1200 feet.

It is, therefore, established conclusively in this case, (2) that there was a complete dedication of Jefferson avenue by the owner of the plot of land, and (2), that the borough has accepted the avenue for the use of the public. So far as the effect of the ordinance is concerned it will be noticed that the grading provided for extended from crossing to crossing only. There is a space of about 100 feet from the upper crossing to Marion street, and a space of about 150 feet from the lower crossing to Larch street which are not included in the ordinance. Under the law this omission is immaterial. It leaves the whole of Jefferson avenue as it is on the plot a dedicated and an accepted street.

3. When the plaintiffs' railroad was built, about the year 1886 or soon thereafter, Jefferson avenue was a public street dedicated to public use. Not only were lots bounding on the avenue sold to various individuals but the plaintiffs' right of way for the railroad at at the point in dispute was purchased with full knowledge of the location of the avenue, the land constituting the right of way being bounded on Jefferson avenue. The plaintiffs did not own the part of the avenue where the railroad crosses. They owned to the avenue on each side, and the only lawful way the railroad could cross the public highway at that point was by crossing it at grade. It is this

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that was actually done. The highway was there first, and in crossing the highway at grade the plaintiffs established a grade crossing, as they had a right to do under the law as it was at that time. Unless this view is taken of the plaintiffs' position, we do not see how they can escape the imputation of being trespassers from the beginning. They did not own the land at the point in dispute; therefore, if they did not establish a grade crossing, they had no right there at all.

4. It is claimed on the part of the plaintiffs that Jefferson avenue where the railroad crosses was not opened on the ground and that from the crossing to Marion street, about 100 feet, there was nothing but an open field. The evidence sustains this claim as to the surface appearance of the ground at the point stated, and we find it as a fact, although, in our view of the law, the finding does not help the plaintiffs' contention. It is also claimed that no crossing was ever "constructed" on Jefferson avenue at the point in dispute until the borough recently attempted to do so. It is true that neither the plaintiffs nor the borough planked the crossing so as to make it easy for public travel; nor did the borough grade the avenue at the crossing, the approaches thereto, or the space between the crossing and Marion street; but this is immaterial under the decisions. It appears also that the plaintiffs built a fence along their right of way. The fence generally was not well maintained. We are, of course, concerned only with the fence at the crossing in dispute. At first a fence was maintained at this place with some degree of regularity. After some years it fell down and was partly repaired; but it cannot be said that much care was taken to preserve its integrity. It is clear from the evidence that for many years people walked across the railroad track on and along Jefferson avenue and that some persons evidently venturesome, drove over the track with horses and wagons. There is considerable evidence on both sides as to the manner and extent of the use made by the public of the crossing; but we do not see how this question is of any importance in the case. The plaintiffs had no right to fence off the highway. They had no right whatever to the street except to cross it, which they did at grade. This determines the present controversy against the plaintiffs.

LAW.

We agree with all that is said by plaintiffs' counsel as to grade

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crossings being a menace to public safety; but we are satisfied that the act of 1901 has no place and cannot be considered in the present case. A case that is similar in some respects is that of the R. R. Co. v. Latrobe Boro., 216 Pa., 221. We quote from Mr. Justice Stewart's opinion:

"It is futile to contend that the act of June 7, 1901, P. L. 531, prohibiting grade crossings, except they are allowed by the court, applies here. The streets of which the grade crossing complained of are a part, were established by ordinance and regularly laid out at least three years before the act went into effect. There is no dispute about this. The mere fact that up to this time the actual crossings are not what they ought to be to meet public requirement as to convenience, is nothing to the point. They are none the less established crossings. It would hardly be contended that the highway had not been constructed, because something remained to be done to make it all that the public had a right to expect. With no more reason can it be urged, that the crossings have not been constructed, because as yet there have been no planks placed alongside the rails, to make travel over them easy. The public had the right to travel on these streets in whatever condition they were in, and this right extended to the railroad crossing as well as any other part."

There is no principle of law beneficial to the plaintiffs to be deduced from the fact that the borough of Dunmore in 1892 ordained the grading of Jefferson avenue only from crossing to crossing, and and did not include the small part of the street near Marion street and the other part near Larch street. Under the evidence the whole of Jefferson avenue as laid out on the plot was a public street. The authorities are clear on this point. In Pittsburg v. Epping-Carpenter Co., 194 Pa., 318, it is decided that it is not necessary that the public use the entire property dedicated; that any public use of a part of the property, indicating a purpose to accept the gift, fixes the public right to the whole; and that when the public right has been acquired it cannot be lost by nonuser. In other words, applying the principle of the latter case to Jefferson avenue the action of the borough in ordaining the grading of the avenue, although a small part of it was omitted from the terms of the ordinance, is a distinct acceptance for public use of the whole of the avenue as plotted and dedicated forty years ago.

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Several cases have been cited in the briefs submitted to us, but it is unnecessary to discuss them in a case which is so clearly against the plaintiffs on the facts.

It is, therefore, ordered that the rule in this case be discharged and that the preliminary injunction heretofore granted be dissolved.

Failure of a railroad company to give statutory crossing signals is held, in Missouri, K. & T. R. Co. v. Saunders (Tex.) 106 S. W. 321, 14 L.R.A.(N.S.) 998, not to be negligence *per se* as to a person on the tracks near a crossing, who is not endangered by any use he is making, or intends to make, of the highways or crossing.

An unrecorded deed is held, in McCalla v. Knight Invest. Co. (Kan.) 94 Pac. 126, 14 L.R.A. (N.S.) 1258, to take precedence over a judgment against the grantor, rendered subsequent to its delivery.

Buyers of an engine who tried it, and then, after notifying the seller's agent that would not accept it, with no special exigency to make its use unvoidable, used it to finish the job, are held, in Fox v. Wilkinson (Wis.) 113 N. W. 669, 14 L.R.A.(N.S.) 1107, thereby to have exercised their election to retain the engine, and to have no right subsequently to repudiate the contract.

The fact that a contract between a paving company and a city may be broad enough to require the the former to repair disintegrations in the pavement caused by the fault of the street railroad company in using too light a rail and in allowing the joints between its rails to become loose, is held, in Owensboro City R. Co. v. Barber Asphalt Paving Co. 32 Ky. L. Rep. 844, 107 S. W. 244, 14 L.R.A. (N.S.) 1216, not to prevent the paving company from recovering for the costs of such repairs from the railway company.

A law declaring Sunday a day of rest is held, in State v. Dolan, 13 Idaho, 693, 92 Pac. 995, 14 L.R.A.(N.S.) 1259, not to be unconstitutional because it does not prohibit all kinds of labor on Sunday.

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In the Court of Common Pleas of Lackawanna County, No. 110 May Term 1907.

Exceptions to Report of Viewers.

In Re: Paving, Grading and Curbing Vine Street from Jefferson Avenue to Monroe Avenue.

It rests with councils to designate what streets shall be paved and the character of the pavement. When the city authorities proceed to repair a street it cannot be said to be a paving of said street, although said repairs should be extensive, and of a reasonably permanent character.

A first pavement in the legal sense, which exempts the abutting property owner from any liability for any subsequent improvement, may be defined generally as one that is put down originally or adopted or acquiesced in subsequently by the municipal authority, for the purpose and with the intent of changing an ordinary road into a street. It may be of macadam or anything else, that is a matter of evidence only.

If the purpose and intent be wanting, a mere surfacing of the road, carefully or extensively done, will not be a paving; but if the intent and purpose be present, or to be fairly inferred, then there is a paving, whatever the material may be.

There is no hard and fast rule on the subject of the kind of paving.

Mere maintenance as a highway, and repairs and repavings for the purpose of such maintenance, are not sufficient.

The controlling question is one of municipal intent. Where it is contended that an improvement to a street had converted that highway from a road into a street, it may be shown that the improvement was either authorized or adopted by the municipal authorities.

D. J. Davis, city solicitor, for petitioners.

Messrs. Willard, Warren & Knapp, for exceptants.

Opinion by Edwards, P. J.

July, 1908.

There are three cases before us, each of the same character, the exceptions being alike in each, and involving the one question of exemption from the cost of an alleged repaving. This opinion is filed in the present number, 110 May Term, 1907, but it is applicable also to 111 of the same term.

Depositions have been taken on both sides. We shall make a brief summary of the facts as we find them.

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1. Between the years 1890 and 1895 the streets in question were substantially repaired by the city of Scranton. The witnesses for the exceptants practically agree as to the character of the work done. The most complete description of the work is given by Mr. Mattes. *Inter alia* he says: "The surface was prepared first and then big chunks of hard furnace cinder were laid, set in place, rolled down to position and then fine crushed stone top dressing placed on top of it, all crushed down with view of making a hard surface. Where they thought it was too steep to put asphalt pavement the Iron & Coal Co. had the cinder run out over their surface and dumped in big slabs to cool, and the city gathered it there and put it on the street; it was rolled with a steam roller.

"Q. Where on Vine street, from what point to what point? A. All the surface from Jefferson avenue up to Quincy avenue was treated that way.

"Q. How was the top treated? A. Treated with a stone that was crushed by a special crusher there.

"Q. And the stone was rolled there in place? A. Rolled in place.

"Q. What kind of a street did you consider that, what kind of a pavement? A. First class, if it is taken care of.

"Q. What is the thickness of that? A. Total thickness in the neighborhood of twelve to eighteen inches, vary according to the grade it was necessary to put; out towards the gutter it was thinner.

"Q. How was it before this pavement was put there? A. A dirt road.

"Q. Same was true of Quincy avenue? A. Same was true of Quincy, except Quincy avenue has hard blue hardpan clay surface right under this."

As to another part of one of the streets Mr. Mattes savs:

"The pavement was done after 1890 when the Iron & Coal Company was grading Clay avenue, making two big cuts through the rock, then in conjunction with the city such portion as was deemed necessary, and particularly this block, the block between Vine and Olive, was surfaced, the first place dug out to the grade and then rock was placed there from the Clay avenue cuttings, heavy rock first, rough, broken down with the hammers and rolled down with such rollers as

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they had at that time; I don't think we had steam rollers at that time, we had a great big four horse roller, and it was fine dressed with material. Later on when Vine street was put through near Nay Aug park the top dressing was done there by the city and hauled and top dressed with a steam roller, and this section and some others.

"Q. What was the character of that road when it was finished? A. It had what I would call a first class macadam finish. Three times during this summer the surface has been broken into with trenches. Each time I examined the character of the top dressing and in every case there was layers from twelve to eighteen inches of a solid, hard, conglomerated mass of rock, more or less broken. The bottom layers had been made of large sections of stone, and the top of broken stone or shale, and it had all gone together like a mass of concrete, it cut with the pick just like concrete."

Mr. Terwilliger testifies that the result was a "sort of artificial road" and Mr. Jayne says that it was "in the nature of an artificial road, the road being largely made of crushed slag rolled over." He says there was an artificial grade given by the city engineer. Mr. Watson says the road was first levelled; then slag and stone were put in for a firm foundation, it was rolled over even with grade and is a firm road today. Other witnesses testify to the same effect.

The testimony of the witnesses for the city vary considerably in the description of the work done. Mr. Jifkins, the present city engineer, who lived in the locality of the street mentioned when the work was done, testifies in part as follows:

"Q. What was the nature of the roadway on Vine street and Quincy at the time you went there? A. Natural roadway.

"Q. What if any paving or artificial work had been done prior to that time? A. None whatever.

"A. What if any work was done on the surface of those two streets, Vine and Quincy, while you were there, that you observed, and in that connection will you describe somewhat the grade of those two streets between the points which I have mentioned? A. Vine street lays on a side hill, of course, pitching to the northwest and also to the southwest. The traffic had worn out the street in the center so that the center of the street was lower than either side of the street, and was in pretty rough condition.

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"Q. What change was made, and about what time? A. I don't know the exact year, but between 1890 and 1894 the city repaired the street; they repaired it by filling up the holes in the street with slag and broken stone, and after the holes were filled they spread either slag or broken stone, I cannot say at this time, both possibly, over the hole in the street, making it a decent, passable roadway.

"Q. You had occasion to use those streets in going to and from work? A. Nearly every day.

"Q. You saw this work while it was being done? A. Yes, sir; I did."

In describing a macadamized street Mr. Jifkins says: "A macadamized street is a street in which the natural ground was dug out to a proper subgrade, heavy stone being laid as a foundation in the bottom, similar stone superimposed, gradually getting smaller until the surface was reached, being constantly wet and rolled until a smooth surface is obtained."

Mr. Acker, the director of public works, says that he made a recent examination of the streets by making several cuts and found that the road had been resurfaced with slag, "varying in size from a lump as big as your first to a lump as big as your head and to a depth of about six or eight inches."

After considering the evidence of all the witnesses, harmonizing as far as possible their various statements, we find that the repairs made on the streets in question, while clearly of a substantial character, did not constitute an original pavement, or such a pavement as will exempt the abutting properties from the cost of the proposed new pavement.

2. Whatever was the character of the work done on the streets by the city the work was done as "repairs". The city authorities took no action by ordinance or otherwise providing for the "paving" of the streets. We find also as a fact that the city has repaired the said streets from time to time since the alleged original paving was laid.

As to the law applicable to the facts of the present case the weight of the authorities is with the city and against the exceptants. We shall here examine some of the cases.

Phila. v. Dibeler, 147 Pa., 261: The city of Philadelphia by

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ordinance authorized the transfer from the highways appropriation of $20,000 for repairing Wooldand avenue and let a contract to macadamize a part of the avenue. Notwithstanding this definite action on the part of the city as evidence by ordinance and contract, it was held by the supreme court that the improvement was not an original paving. In a per curiam the court says: "The contract was made, and the work was done, under an ordinance of the councils, of Philadelphia, approved Nov. 5, 1883, authorizing certain transfers in annual appropriations. Of the amounts so transferred the sum of $20,000 was appropriated for repairing Woodland avenue, the street in question. This was not in any sense a paving of said avenue. That it was a substantial repair is not to the purpose. It rests with councils, as we have repeatedly said, to designate what street shall be paved; and the character of the pavement. When, therefore, the city authorities proceed to repair a street, it cannot be said to be a paving of said street, although said repairs should be extensive, and of a reasonably permanent character. It is to be noted that the repair of this street was done at the expense of the city, and not that of the abutting property owners."

Phila., &c. v. Hill, 166 Pa., 211, specifically affirms the Dibeler case. The controversy related to the same improvement of Woodlawn avenue.

Phila. v. Eddleman, 169 Pa., 452: The city of Philadelphia in 1873 acquired the Ridge avenue turnpike, a macadamized road, and from time to time had repaired the said road and repaved it with macadam. In 1890 the city tore up the macadam and repaved with Belgian blocks. If, under this state of facts, the property owners were held liable for the cost of the new pavement, how can the exceptants in the case at bar hope to escape the burden now cast upon them by the city? In the Eddleman case Justice Mitchell reviews many of the former cases. He says: "A first pavement, therefore, in the legal sense which exempts the abutting property owner from any liability from any subsequent improvement, may be defined generally as one that is put down originally, or adopted or acquiesced in subsequently by the municipal authority, for the purpose and with the intent of changing an ordinary road into a street. It may be of macadam or of anything else, that is a matter of evidence only. If

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the purpose and intent be wanting, a mere surfacing of the road, however carefully or extensively done, will not be a paving; but if the intent and purpose are present, or to be fairly inferred, then there is a paving, whatever the material may be."

We may say incidentally as has been said in one of the cases that there is no hard and fast rule on the subject of the kind of paving. It is a question of fact in each case, and the governing consideration is the nature of the municipal action with regards to it.

The next case is Dick vs. Phila., 197 Pa., 467, which follows closely the principles laid down in Phila. vs. Eddleman, supra.

Harrisburg vs. Funk, 200 Pa., 348: We cite this case because it lays down some principles which are applicable to some of the phases of the case at bar. Justice Potter uses the following language:

"Mere maintenance as a highway, and repairs and repavings for the purpose of such maintenance, are not sufficient; Philadelphia vs. Dibeller, 147 Pa., 261. Even the laying of gas pipes along a highway and the grading, curbing and paving of sidewalks is not in itself sufficient evidence of municipal adoption to prevent a subsequent paving at the expense of the abutting property, Dick vs. Philadelphia, 197, Pa., 467.

"The controlling question is one of municipal intent. Where it is contended that an improvement to a street had converted that highway from a road into a street, it must be shown that the improvement was either authorized or adopted by the muncipal authorities.

"There is no evidence of any ordinance of the city of Harrisburg authorizing or adopting any formal improvement, neither is any contract in relation thereto shown, and there is, of course, no contention that the municipality ever exercised any statutory authority with respect to the paving of the street, prior to the present time. Undoubtedly there might be an acquiescence short of this, but the entire absence of formal muncipal action is strong presumptive evidence of lack of municipal intent to adopt the road as a paved street. Municipal adoption or acquiescence cannot be assumed. It must be proven."

Many of the cases cited by exceptants' counsel are reviewed and explained by Justice Mitchell in Philadelphia vs. Eddleman, supra.

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We add nothing to the interest of the discussion by going over the ground traversed so thoroughly by the supreme court. We are of the opinion that the merits of the present controversy are with the city, and we, therefore, dismiss the exceptions and confirm finally the report of the viewers.

That a bank which agrees to let another bid for and obtain the deposit of county funds, with the understanding that the latter bank will redeposit a portion of the funds with it, cannot be compelled, in an action by the county, to refund the money alleged to have been so redeposited, on the theory that it was an undisclosed principal in the transaction, is held, in Henry County v. Citizens' Bank, 208 Mo. 209, 106 S. W. 622, 14 L.R.A.(N.S.) 1052, where the statute authorizing the deposit requires that banks with which the county is dealing shall be disclosed upon the records, and permits only one bank to be selected as depositor.

The appointment of an administrator *de bonis non* and the distribution by him to the remainderman are held, in Cream v. McMahon (—Md.—) 68 Atl. 265, 14 L.R.A.(N.S.) 798, not to be necessary to vest in him title to a leasehold bequeathed to the executor for life with remainder over, where the executor distributes the life estate to himself in his accounts which are approved by the probate court and dies without actually distributing the remainder.

The killing of a boy by his father is held, in State v. Speyer, 207 Mo. 540, 106 S. W. 505, 14 L.R.A.(N.S.) 836, not to be deliberate within the rule that a killing must be with premeditation and deliberation to constitute murder in first degree, when the father, under apprehension of immediate separation from the child, and the fear that it may be disgraced and mistreated, finding it asleep, is struck with the thought of killing it, which he instantly executes, no malignity existing in his heart toward the child at the time, and the deed not being prompted by motives of revenge.

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In the Court of Common Pleas of Lackawanna County, No. 1154 September Term, 1906.

Sci. fa. sur. municipal lien.

Ctiy of Scranton vs. Daniel Murray, et. al.

The defendant died before sewer ordinance was passed. Because of this the administratrix objected to the assessment and lien. Held: The administratrix of the owner of the property being in court, by her own act, and the proceeding being *in rem*, the objection cannot be sustained.

Mr. D. J. Davis, city solicitor, for plaintiff.

Mr. I. H. Burns, for defendants.

Opinion by Edwards, P. J.

August 3, 1908.

The verdict in this case was in favor of the plaintiff for $98.14, the amount with interest due on a sewer assessment.

The legality of the assessment is not questioned. It was made by viewers and is against the land of Daniel Murray.

The lien was filed November 28, 1898, in the name of the City of Scranfon v. Daniel Murray, owner or reputed owner. Defendant objected to the assessment and lien because Daniel Murray had died before the sewer ordinance was passed. This objection is not sustained for the reason that the proceedings are in rem.

The next objection was to the *scire facias*. It was issued against Dainiel Murray and Patrick Ryan Estate. It is claimed that this is a fatal defect, there being no lien or assessment against Patrick Ryan Estate; or, in other words, that the *scire facias* does not follow the lien. We do not consider this objection tenable. The *scire facia* follows the lien in every particular except that the name "Patrick Ryan Estate" is added as defendant. While this practice is not warranted it does not defeat the right of the city to collect in this case. The *scire facias* should have been issued against Margaret Murray, administratrix of Daniel Murray, deceased. It is to be noted in this connection that the writ was served on the administratrix and so returned by the sheriff. It appears from the record in the present case that it has been tried once before and that a new trial was granted

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because of the irregularity now under consideration. The order was made by our former learned colleague, Judge Kelly; but it was made more in the interest of correct practice than for any other reason. In the opinion on this question, filed in the Cawley case, (1137 Sept. T. 1900), the following language is used: "The third reason is that the praecipe and writ do not follow the lien. We are not prepared to say that this objection, under the state of the record, is fatal; but, in the interest of proper practice we are of the opinion that a new trial should be granted on this ground."

Whatever view may be taken of the question of practice above discussed, we think the defendant is precluded from now pleading any technical defect. Margaret Murray, the administratrix of Daniel Murray, has appeared to defend the case. She filed an affidavit of defense on September 17, 1900. The defense made is that the lien was not filed until after the expiration of six months from the time the final assessment was made. No other defence is suggested. On the ground of a waiver of the technical defence based on the variation between the *scire facias* and the lien, and on the further ground that the discrepancy referred to is not in itself a fatal defect, the rule for judgment should be discharged.

There is a valid assessment; the lien was filed in time; the administratrix of the owner of the property is in court by her own act, and the proceeding is *in rem.*

Now, August 3, 1908, the rule for judgment non obstante veredicto is discharged and judgment is entered upon the verdict as of its date for $98.14, in favor of the plaintiff and against Margaret Murray, the administratrix of the estate of Daniel Murray deceased.

That a physician may be charged with manslaughter by causing the death of a sick child by advising a diet which results in its starvation, under a statute which treats all persons concerned in the commission of an offense as principals, although it was the mother of the child who actually withheld the food from it, in the absense of the accused, is declared in state v. McFadden (—Wash.—) 93 Pac. 414, 14 L.R.A.(N.S.) 1140.

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In the Court of Common Pleas of Lackawanna County.

No. 839, March Term, 1907.

Rule for Judgment for Defendant and rule for New Trial.

John H. Short vs. The Delaware & Hudson Company.

Corporations act through agents. The public is not informed as to the specific and private instruction which may be given to them, limiting their ostensible powers. A just protection to persons dealing with corporations imperatively requires that the act of the agent, within the general scope of the business with which he is entrusted, will bind the company, although the specific act might be in excess of his private instruction.

This doctrine would seem to apply with peculiar force where the parties are dealing with perishable fruit. In such case the shipper or consignee must act immediately or not at all.

Mr. S. B. Price, for plaintiff.

Messrs. Welles & Torrey, for defendant.

Opinion by Newcomb, A. L. J., July 20, 1908.

There was a verdict for plaintiff in an action or assumpsit for damages for breach of an alleged agreement made with defendant's freight agent. So far as in dispute the facts as settled by the verdict are the following:

Three carloads of berries were shipped from the south to the plaintiff, who is a wholesale produce merchant in this city. They were carried by connecting lines of railroad. The last carrier was the defendant company which received them at Wilkes-Barre. There had been some delay in transportation, although it didn't appear at the trial to be chargeable to the defendant. When the cars arrived at their destination here the fruit was found to be damaged and to some extent unsalable. For that reason plaintiff at first refused to accept the goods and pay the freight charges. He finally did so at the request of the freight agent upon the latter's assurance that if he would take them and do the best he could with them the company would stand the loss, if any. Relying upon that, plaintiff accepted the shipment and paid the charges for the entire carriage amounting to several hundred dollars. The agent had general charge of the receipt and delivery of all shipments arriving here over the defendant's road and the collection of freight charges. In case of perishable and damaged goods where acceptance was refused by the consignee he was accustomed to turn the shipment over to a disinterested merchant to be disposed of on defend-

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ant's account, and to transmit to the proper department any claim for damages made by the consignee. This was the extent of his specific authority in such case as defined by the company's regulations. While the plaintiff had known of that course having been taken in at least one instance, he had no other knowledge of the defendant's rules nor of the scope of the agent's express authority in the premises.

On these facts it was left to the jury to say whether the agent's promise was within the apparent scope of his authority; and, considering the nature and character of his duties as well as the plaintiff's relations and familiarity with the road as a shipper, whether as a merchant of ordinary prudence he would be naturally led to believe the promise was within the range of the freight agent's authority.

The defendant's motion is founded upon the claim that there was no evidence of actual authority, nor sufficient evidence to raise a question as to the agent's apparent authority to bind the company.

At the trial the point seemed doubtful. But on further consideration we are unable to distinguish the case in principle from Adams Ex. Co. v. Schlessinger, 75 Pa., 246. The freight agent was entrusted with the disposition of these shipments on the plaintiff's refusal to accept them. That was a part of his business. The company's regulations, as was said in the case referred to, could not be assumed to be known to the plaintiff. True, he might have had such knowledge of the agent's customary disposition of shipments under like circumstances as would put him on his guard against limitations of the agent's authority. That, however, was for the jury. "It was a representation made in the course of the business intrusted to his particular care. Corporations act through agents. The public is not informed as to the specific and private instructions which may be given to them, limiting their ostensible powers. A just protection to persons dealing with corporations imperatively requires that the act of the agent, within the general scope of the business with which he is intrusted, shall bind the company, although the specific act may be in excess of his private instructions."

Adams Ex. Co. v. Schlessinger, *supra*.

This reasoning was quoted with approval in Beal's, et al. v. Adams Ex. Co., 13 Sup. Ct., 143.

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The doctrine would seem to apply with peculiar force where the parties are dealing with perishable fruit. In such case the shipper or consignee must act immediately or not at all. There is no time to investigate the exact limits of the freight agent's actual authority. The nature of the property and the necessity for prompt action is naturally suggestive to the ordinarily prudent merchant that the agent has been entered on the verdict for plaintiff *sec. leg.*

Looking at the case in that light I do not see how the motion for judgment for defendant can prevail.

The motion for new trial was not seriously pressed at the argument, and, accordingly, both rules are discharged. Let judgment be entered on the verdict for plaintiff *sec. leg.*

A stipulation in an arbitration agreement in a pending action by which defendant binds his legal representatives to abide by the award is held, in Brown v. Fletcher, 146 Mich. 401, 109 N. W. 686, 15 L.R.A. (N. S.) 632, not to empower the court, upon his death, to revive the action against his legal representatives so as to bind his executors and estate in another purisdiction.

The heirs apparent or presumptive, or those depending upon an alleged incompetent person for support, are held, in Tierney v. Tierney (Neb.) 115 N. W. 764, 15 L.R.A. (N. S.) 436, to be entitled to appeal from an order of the county court dismissing their petition for the appointment of a guardian for such incompetent.

Fees wrongfully exacted under an unconstitutional statute by a county clerk by reason of his official position, for the filing of inventories and appraisements of decedents' estates required to be filed within a given time in order that the administration may proceed, are held, in Trower v. San Francisco (Cal.) 92 Pac. 1025, 15 L.R.A. (N. S.) 183, to be recoverable as involuntarily paid, although the filing could have been compelled by mandamus.

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In the Court of Common Pleas of Lackawanna County.

No. 669, March Term, 1908.

Rule for Judgment for Want of Sufficient Affidavit of Defence.

John J. Judge vs. G. A. Pyle.

The supreme court has said more than once, speaking of the act of May 25, 1887, that as to all matters of substance, completeness, accuracy and precision are as necessary now to a statement as they were before to a declaration in the settled and time-honored forms. It is essential that the statement contain all the ingredients of a complete cause of action averred in clear, express and unequivocal language.

Mr. P. L. Walsh, for plaintiff.

Mr. J. E. Brennen, for defendant.

Opinion by Carpenter, A. L. J. July, 1908.

The plaintiff bases his claim in this case upon a paper signed and sealed by the defendant, G. A. Pyle, from which it appears that at a sheriff's sale of the personal property of W. L. Barton the defendant Pyle became the purchaser for the sum of $227.35. The paper purports to have been drawn subsequent to, though on the day of the sale, and recites: Whereas, there are now certain wages, claims, indebtedness and judgments due and owing by the said W. L. Barton, to wit, John J. Judge, assignee, amount $1,700; indebtedness to Charles H. Forbach and G. A. Pyle, and wage claims appealed and certioraried to court.

This is followed by a declaration that the said personal property was so transferred and sold to the said Pyle and held by him in trust. That the mine and breaker are to be operated under his management and control; that from the net monthly profits he shall pay and hold himself responsible to pay towards the liquidation of the present indebtedness the following: To the wage claims held by John J. Judge, assignee, twenty-five per cent. of said profits, until the whole amount now due said John J. Judge, assignee, is fully paid. And if the profits are not sufficient to pay the amount due said John J. Judge in four months from the date thereof, I further agree to pay in full the said amount of claim held by said John J. Judge of February 10, 1908.

It further provided for the payment of twenty-five per cent. monthly to each of two other creditors until their claims were paid in full.

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The balance, twenty-five per cent., to be paid into a reserve fund for the purpose of liquidating all indebtedness now on record against the said W. L. Barton; and after all the foregoing indebtedness is fully paid, together with expenses of management, the residue and remainder to be paid over to said W. L. Barton.

It is difficult to tell from the plaintiff's statement what specific thing is claimed as his cause of action. Did the defendant manage the business and make a profit, of which he failed to turn over twenty-five per cent. to the plaintiff in payment of his claim? Or did he neglect to operate at all, and does the plaintiff ground his action upon his total failure to carry out his undertaking? The precise cause of action in the one case would be different from the other.

The supreme court has said more than once, speaking of the act of May 25, 1887, that as to all matters of substance, completeness, accuracy and precision are as necessary now to a statement as they were before to a declaration in the settled and time-honored forms. It is essential that the statement contain all the ingredients of a complete cause of action averred in clear, express and unequivocal language. That this objection has not been raised by the defendant makes no difference, because a judgment for want of a sufficient affidavit of defense is, in effect, a judgment on demurrer, and, like all such judgments, must be self-sustaining on the face of the record.

The defendant, by his affidavit of defense, denies any personal liability, and avers that when the writing was executed it was expressly agreed and understood by all parties interested, that he was not acting in a personal, but in a representative capacity, and was not to become personally liable for any of the indebtedness of W. L. Barton, but only for the profits realized from carrying on the business; and that no profits were realized. The affidavit may be open to the crticism that it states conclusions rather than facts, but on the whole record the plaintiff's right to judgment is not clear, and we are disposed to allow the defendant an opportunity to show, if he can, such facts, suggested by the affidavit, as may constitute a defense. See Kerr vs. Culver, 209 Pa. St., 14.

The rule for judgment is discharged.

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In the Court of Common Pleas of Lackawanna County.

No. 330, January Term, 1908.

Rule to show cause why a Writ of Estrepement shall not issue.

Thomas Morris, by his next friend, Margaret Birtley vs. Crad Morris.

When a writ of estrepement is asked for the proper practice is to award the writ upon a proper showing, first requiring that security be given to the defendant as in case of a preliminary injunction, defendant to have the right to move to dissolve at any time after the issuing of the writ, and upon such motion to dissolve the court shall hear the parties upon the merits and make such further order as shall seem just and proper.

Messrs. O'Brien & Kelly, for plaintiff.

Mr. D. J. Davis, for defendant.

Opinion by Carpenter, A. L. J. July, 1908.

The remainderman makes this application against the life tenant for a writ of estrepement to stay waste, consisting of not keeping the dwelling house which is in the possession of the defendant in proper repair. The petition and the testimony in support of it show sufficient to entitle the plaintiff to the writ.

The act of 10th April, 1848, P. L. 472, extending the act of 29th March, 1822, 7 Sm. L., 520, to remaindermen, is authority for issuing the writ. The second section of the act of 1822 provides that the person in possession may at any time after the writ issues, apply to the court to have it dissolved, and the court shall hear the parties in a summary manner, and may dissolve the said writ or make such further order therein as to them may seem just and right. And by the act of 11th April, 1862, P. L. 430, it is enacted that the provisions of the act of 6th May, 1844, requiring security upon the issuing of injunctions, shall apply to all writs of estrepement.

The proper practice, therefore, would seem to be to award the writ upon a proper showing, first requiring that security be given to the defendant as in case of a preliminary injunction, the defendant to have the right to move to dissolve at any time after the issuing of the writ, and upon such motion to dissolve the court shall hear the parties upon the merits and make such further order as shall seem just and proper. See Humphries vs. Humphries, No. 51, Nov. Term, 1904.

And now, July, 1908, the rule is made absolute and the writ is awarded as prayed for, upon the plaintiff giving bond to the defendant in the sum of three hundred dollars, with sureties to be approved by the court.

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In the Court of Quarter Sessions of Lackaanna County.

No. 60, February Sessions, 1908.

Rule for a New Trial.

Commonwealth vs. Joseph Van Dyke.

The absolute exemption secured to the defendants by the constitution and laws, from being compelled to testify, and from having their omission to do so used in any way to their detriment could not be effected by superfluous or irregular suggestions by their counsel in the heat of argument.

That exemption could not be waived by each defendant's own election to avail himself of the constitution, and to go upon the stand as a witness.

Joseph O'Brien, District Attorney, for commonwealth.

Messrs. Vosburg & Dawson, for defendant.

Opinion by Carpenter, A. L. J. July, 1908.

The defendant was found guilty of larceny. The principal reason assigned for a new trial is the language of the assistant district attorney in his closing argument to the the jury. An affidavit made by defendant's counsel attributes to him the following remarks: "We have no denial here but that the defendant took the money." Again, "That there is no denial that the defendant took the money." And, "That there is no denial of the defense of taking the money." The meaning of the last sentence is not clear, and it is probable that it is not a verbatim reproduction of counsel's language.

The act of assembly of 23 May, 1887, P. L. 158, sec. 10, provides, that the neglect or refusal of any defendant in a criminal court to offer himself as a witness, shall not be treated as creating any presumption against him, or be adversely referred to by court or counsel during the trial. It was claimed upon the argument of this rule that the fact that counsel for defendant in his argument to the jury volunteered an explanation of his reason for not calling the defendant as a witness would justify the prosecuting attorney in commenting upon it; but I do not think that position is tenable.

In Com. vs. Scott, 123 Mass., 239, counsel for defendant gave his reasons why defendants were not called to testify and thereupon the court permitted the prosecuting attorney to comment upon their

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failure to testify. For this the supreme court reversed and said: The absolute exemption secured to the defendants by the constitution and laws, from being compelled to testify, and from having their omission to do so used in any way to their detriment, could not be affected by superfluous or irregular suggestions of their counsel in the heat of argument. That exemption could only be waived by each defendant's own election to avail himself of the statute, and to go upon the stand as a witness.

We do not think, however, that the remarks of the counsel for the commonwealth in this case constitute an infringement of the rights of the defendant. There was no remark or comment on the fact that he was not called as a witness, not so much as a suggestion that he was competent to testify.

In Com. vs. Furman, et al., 22 Lanc. L. Rev., 225, counsel for the commonwealth in closing to the jury said: "Harvey Shaub testified, and he stands uncontradicted in this case;" and it was held that this was not in violation of the act of 1887. In his opinion refusing a new trial, Judge Landis said: "The defendants were not referred to in any way. For all that appears, the counsel may have been referring to the testimony of the commonwealth, and his statement may have meant that there appeared nothing in it contrary to the testimony of Shaub. What is prevented by the act of assembly and that alone, is the reference by counsel to the fact that the defendants, who are in court, have not testified in their own behalf."

In Com. vs. Elder, 34 Leg. Int., 400, the district attorney said in substance, that the defendants have submitted no evidence whatever; no explanation of the serious charges made and supported by strong testimony; and it was held that this was not in violation of the rule.

In Sutton v. Com., 85 Va., 128, it was held that remarks of the prosecuting attorney to the jury, that the prisoner had not accounted for his whereabouts at the time of the homicide, nor his flight from the state, without allusion to his failure to testify, was not within the statute of that state.

In Frazier vs. The State, 135 Ind., 38, the prosecuting attorney, in his argument to the jury, said: "Not a particle of evidence has come

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to you from the defendant, from his side of the case." It was held that this was not a violation of the statute which forbids comment on the fact that a defendant in a criminal case does not testify in his own behalf. A statement by counsel to the jury that the record does not show any evidence denying the crime, was held, in State vs. Seely, 92 Iowa, 488, not such a reference to defendant's failure to testify as necessitated granting a new trial.

The jury was carefully instructed to infer nothing against the defendant from his failure to testify in his own behalf; and while this would perhaps not undo the mischief in a case where there had been a clear violation of the law, yet on the whole case I am not convinced that the defendant has a just cause of complaint.

Without discussing the other reasons asigned they are all overruled, and the rule for a new trial is discharged.

An attorney who states in a petition for a rehearing that it is commonly reported that the court was controlled by political motives in its decision in the case, and suggests that,in order to relieve itself from such slanderous rumors, it should entertain the petition, and that the petition need not become public property, is held, in Re: Robinson (Wash) 92 Pac. 929, 15 L.R.A. (N. S.) 525, to violate his statutory duty to maintain due respect to the court, and to abstain from offensive personality, and to be guilty of an attempt to intimidate the court into a favorable decision, although he himself disavows his belief in the truth of the scandalous statements and of any intention to reflect on the court.

One who pays more than a fourth of the estimated value of land which she mistakenly believes her parents have bound themselves to convey in order to have the contract canceled is held, in Tucker v. Denton, 32 Ky. L. Rep. 521, 106 S. W. 280, 15 L.R.A. (N. S.) 289, to be entitled to recover it back, mistake being as to an existing fact, material, controlling, and mutual, or, if not mutual, the vendees being guilty of fraud in receiving the money when they knew the contract was unenforceable.

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In the Court of Common Pleas of Lackawanna County. . .

No. 797, March Term, 1908.

Certiorari.

Chloe E. Tewsbury vs. K. E. Miller.

The penalty for trespassing on land posted as private property is regulated by the Act of 1905, P. L., 169.

An action to recover such penalty should be brought in the name of the commonwealth to the use of the district; or, in the name of the person injured to the use of the school district.

This statute being penal in character must be construed strictly.

Fr. I. H. Burns, for defendant.

Opinion by Edwards, P. J., July, 1908.

This suit was brought before a justice of the peace to recover a penalty for a trespass on land posted as private property. The offense is defined by the act of 1905, P. L. 169.

Of the numerous exceptions filed we shall refer to two only.

The first relates to the party plaintiff. It is claimed the suit should have been brought in the name of the commonwealth to the use of the Greenfield School District. The third section of the act of assembly provides that "all penalties recovered under this act shall be paid to the school fund of the district in which the trespass was committed." There is merit in this exception. It would have been proper to have brought the suit in the name of the commonwealth to the use of the district; or, in the name of the person injured to the use of the school district. Either of these two ways would be in conformity with good practice. The present suit was brought in the name of Chloe E. Tewsbury, who was the complainant, or the person in possession of the land on which the trespass was committed. Nevertheless, we would not reverse the proceedings on this ground alone. The record of the justice has the following entry: "It is further ordered that the said fine of five dollars be paid to the school fund of Greenfield School Ditsrict in the said county of Lackawanna in conformity with the provisions of the act of April 14, 1905, P. L. 169."

In the face of this record we consider the exception to the plaintiff's name as technical in character, although we have indicated the correct practice as to the name o fthe party plaintiff in such a case.

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The other exception is of a more serious nature. It goes to the form of the judgment. The justice sentenced the defendant to pay a fine of five dollars and costs, and in default of payment that he should be committed to the county jail for 16 3-4 days. In substantially the same words is the judgment entered by the justice.

The act of assembly provides that "in default of payment of said fine and costs, the party convicted shall be committed to the county jail of the proper county for one day for each dollar of fine imposed." This statute being penal in character must be construed strictly. But strict construction is not necessary in the face of the plain language of the act. The imprisonment in default of payment is "for one day for each dollar of fine."

This error in the entry of judgment and in the form of the sentence vitiates the proceedings, which are therefore reversed.

The liability of a third person for the loss of a horse which he is knowingly using for a purpose no contemplated in a contract of bailment is held, in Palmer v. Mayo, 80 (Conn.) 353, 60 Atl. 369, 15 L. R. A. (N. S.) 428, not to be affected by the fact that the loss is due to an inevitable accident.

A permit for a building, issued under a misconception of the facts in contravention of the building regulations of the city, is held, in O'Bryan v. Highland Apartment Co. (Ky.) 108 S. W. 257, 15 L.R.A. (N. S.) 419, to be revocable, even after building operations have begun.

A transfer by an insolvent within four months prior to the filing of a petition, for the purpose of securing or paying a pre-existing debt, without any intent or purpose to affect other creditors injuriously beyond the necessary effect of the security, is held, in Coder v. Arts, 82 C. C. A. 91, 152 Fed. 943, 15 L.R.A. (N. S.) 372, to be lawful if not violative of other provisions of the law, and to be no evidence of intent to hinder, delay, or defraud creditors, within the meaning of the bankruptcy act.

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In the Court of Common Pleas of Lackawanna County.

No. 439, November Term, 1907.

Rule to Open Judgment.

Standard Brewing Co. vs. Guiseppe Saracino.

A judgment was entered on a contract which provided, inter alia, that defendant should purchase for a certain term of years fifty per cent. of all liquors used in his hotel.

Defendant claimed, and was corroborated by the testimony of other witnesses, that he failed to make the purchase because the plaintiff company refused to sell him for the same price at which he could obtain the goods from other dealers. Upon this showing the court made absolute a rule to open the judgment.

Mr. Ralph Rymer, for plaintiff.

Messrs. Vosburg & Dawson, for defendant.

Opinion by Carpenter, A. L. J., June, 1908.

This judgment was entered on a contract in writing between the parties, which provided, among other things, that the defendant should purchase for the term of five years from June 1, 1907, fifty per cent. of all liquor, beer, ale and porter used in his hotel, from the plaintiff company, and all of the whiskey, wines and brandy used on said premises from the Scranton Distributing Company, provided that the same should be sold to him at the same price that he could buy them from other parties. The instrument contained a confession of judgment by the defendant in the sum of five hundred dollars, which sum is to be taken as liquidated damages, and provided that execution may issue upon affidavit of breach.

On October 15, 1907, affidavit was filed on behalf of the plaintiff alleging that defendant had failed to comply with the agreement by purchasing liquors, etc., as therein stipulated, and judgment was entered and execution issued for five hundred dollars. The defendant claims in justification of his failure to purchase from the plaintiff and the Scranton Distributing Company, that they refused to sell him for the same price at which he could obtain the goods from other dealers. He is corroborated by the testimony of other witnesses whose depositions were taken, and without passing upon the other questions in the case at this time, we think he is entitled to have the case submitted to a jury.

The rule to open the judgment is made absolute; the contract of May 3, 1907, to stand as plaintiff's statement, defendant to plead non assumpsit.

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In the Orphans' Court of Lackawanna County.

No. 531, Series C.

Sur Citation to Guardian to File an Account.

In Re: The Estate of Elizabeth Gibson, a Minor.

A guardian will not be required to file an account of the estate of her late ward unless funds are shown to have come into her hands.

Mr. H. W. Mumford, for petitioner.

Mr. M. J. Donahoe, respondent.

Opinion by Sando, P. J., March 30, 1908.

The petition of Elizabeth Gibson, represented that Emma Brown had been appointed her guardian by this Court, on December 7th, 1901; that she became twenty-one years of age on February 21, 1907; and that no account had been filed by Emma Brown as guardian.

The answer of Emma Brown set out: That no account has been filed by her as guardian for the reason that no money or property of any kind had ever come into her hand as guardian; that her appointment was made in connection with the sale of the real estate of Taylor A. Gibson, deceased, father of the petitioner; that no money or property had, however, come into her hands as guardian; and, that she has no funds even to defray the expense of counsel to make her answer to the petition to file an account.

By the act of March 29, 1832, P. L. 190, section 4, the jurisdiction of the Orphans' Court extends and embraces "the appointment, control, removal, and discharge of the guardians of minors, and the settlement of their accounts." By this is meant not only the settlement of the receipts and disbursements on behalf of the wards, but all transactions concerning the care, custody, and collection of their personal estate, the management of their real estate, expenditures for support and education, and final ascertainment of either the indebtedness of the guardian to the ward, or of the ward to the guardian.

One of the objections which the guardian may allege to her being required to file an account is that she has received no assets. She should not be compelled to incur the expense attending an accounting, unless she has in fact had assets, of the disposal of which the ward has

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a right to be informed, or unless her negligence is the probable cause of her never having secured assets that in fact belonged to the ward. When it appears, therefore, to the court, by the answer and the testimony, that she has had neither possession nor opportunity to gain possession of any assets, the petition for an account will be dismissed.

If moneys of the late minor be received by the guardian after the ward attained her majority, the remedy is not in the Orphans' Court for an account, but in another forum.

In order, that claims, if any, for services rendered for the benefit of her ward, for maintenance or moneys expended in her behalf, may be judicially determined, the guardian should file an account, although she can not charge herself with moneys or property received.

A careful examination of the testimony supports the denial of the guardian. We think no reason has been shown to compel the guardian to file an account or that any should be stated against her.

Now March 30th, 1908, the petition to compel the guardian to file an account is dismissed.

A benefit fund contributed by the members of a subordinate lodge for their own use is held, in State Council v. Emery, 219 Pa. 461, 68 Atl., 1023, 15 L.R.A. (N. S.) 330, to belong to them; and therefore it is held that, upon the revocation of its charter, the fund cannot be taken by the parent body under charter provisions which require the property of the former to be turned over to the latter, but in which no mention is made of money, nor under a statute requiring "moneys" to be turned over, where it also provides that such funds shall be held for the same purposes and intents for which they were received by the subordinate association.

A momorandum written on the back of a promisory note at the time of execution, which limits its consideration, affects its operation, and was intended to be a part of the contract, is held, in Kurth v. Farmers' & M. Bank (Kan.) 94 Pac. 798, 15 L.R.A. (N. S.) 612, to be regarded as a substantive part of the note.

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In the Court of Common Pleas of Lackawanna County.

No. 1059, November Term, 1907.

Rule for a New Trial.

James S. Lawson vs. The J. E. Hess Baking Company.

The business of the defendant was thrown into confusion for some hours, if not for a whole day, through the insubordination of the plaintiff in countenancing a strike among the employes of the defendant. For so doing the plaintiff was discharged on July 14, 1907.

The question was as to the right of the plaintiff to recover wages for the month of June and for eleven days in the month of July. The jury gave a verdict for plaintiff.

The jury was instructed to the effect that if they found the plaintiff had been discharged for good cause he was entitled to his wages to the time of his discharge.

Held; That the plaintiff was entitled to his wages for the month of June only.

Messrs. C. A. Battenberg and M. J. Ruddy, for plaintiff.

Mr. C. L. Hawley, for defendant.

Opinion by Edwards, P. J., July 20, 1908.

The plaintiff was manager of defendant's bakery business. His wages were fixed at the rate of $900 a pear, payable $75 per month, with a percentage of the profits. We are not concerned now with the percentage of profits. Plaintiff claimed that his wages had been raised to $85 per month. This contention was settled against the plaintiff by the jury. The claim of the plaintiff that he was also entitled to one month's notice before being discharged, and consequently to the month's pay covered by the notice, met the same fate at the hands of the jury. Therefore the facts of the case as they should be considered on a rule for a new trial are few and simple.

The plaintiff was discharged on July 13, 1907, for insubordination and for countenancing a strike among the employes of the defendant. It is true the strike was not a formidable one; yet, the business of the defendant was thrown into confusion for some hours if not for a whole day. Such conduct on the part of the plaintiff was highly reprehensible, and the jury found that he was discharged for good and sufficient cause.

The only question left is the right of the plaintiff to recover his wages for the month of June and for the eleven days in the month of

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July. The jury gave a verdict for the month and eleven days. Defendant's counsel claims that the plaintiff had forfeited his right to all the wages unpaid at the time of his discharge. The jury were instructed to the effect that if they found the plaintiff had been discharged for good cause he was entitled to his wages to the time of his discharge. It appeared from the evidence that the plaintiff had been a faithful servant of the defendant until the day of the so-called strike, July 12th. There was no complaint of his management of the business up to that time. Indeed, it may be fairly gathered from the evidence that he performed the duties of his employment with exceptional fidelity from the time he was first engaged to the day preceding his discharge. It therefore appeared clear to us that the plaintiff had not forfeited his wages for the month of June.

Was there error in permitting the jury to include in the verdict the wages for the eleven days in July? On a review of the case we are of the opinion that the plaintiff is entitled to the wages for June only. The plaintiff was paid monthly. The services for June were complete and the settlement period had passed. We think that the case of Peniston vs. John Huber Co., 196 Pa., 580, is an authority applicable to the case at bar. In the case cited the plaintiff was employed as manager for the term of two years with the right to receive one-third of the profits. Settlements were to be made every three months. The case was reversed and was sent back for trial to ascertain how much plaintiff's one-third share of the profits was for the three months' settlement period which had ended before or about the time he was discharged. It was held that he was entitled to this amount, although he had forfeited everything else.

We therefore hold that plaintiff is entitled to his wages for the month of June, viz. $75, with interest from August 1, 1907, the time fixed by the jury.

It is ordered that if the plaintiff within thirty days from this date remit all of said verdict except the sum of $75, with interest from August 1, 1907, the rule for a new trial shall be discharged; otherwise rule absolute.

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In the Court of Common Pleas of Lackawanna County.

No. 8, September Term, 1905.

Equity.

Rule to show cause why the Status Quo should not be Preserved, Etc.

Helen M. Fuller vs. Charlotte Fisk, Thomas S. Fisk and Esdras Howell Fisk.

Where a final decree is entered in making an injunction permanent and defendants take appeal, the court will fix a time for a hearing as to the amount of bail and as to the propriety of preserving the status quo. Act of 1897, P. L., 68.

Messrs. Williard, Warren & Knapp and Messrs. Welles & Torrey, for plaintiff.

Messrs. Agib Ricketts, G. S. Horn and Fred C. Hanyen, for defendants.

Opinion by Edwards, P. J., July 20, 1908.

There was entered in this case a final decree making the injunction against the defendants permanent. Defendants took an appeal and afterwards asked the court to fix the amount of the bail in accordance with section nine of the act of 1897, P. L. 68. When the amount of the bail was fixed our attention was not called to the concluding part of said section, which provides that the court below may, notwithstanding the appeal, make such order or decree, as may be necessary to preserve the *status quo* pending the determination of the appeal. Had our attention be called to this part of the act when the bond was approved, we would have fixed a time for a hearing as to the amount of bail and as to the propriety of preserving the *status quo*.

After the order fixing the amount of bail was made, the defendants proceeded to do some of the things they were enjoined from doing by the terms of the injunction; and thereupon, the plaintiff came into court and obtained the rule now under consideration.

In our opinion it is highly proper and desirable that the *status quo* in the present case should be maintained. And the *status quo*, undoubtedly, relates to the existing state of things at the time the appeal was taken.

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We therefore make the rule absolute and make the following order:

Now, July 20, 1908, on the hearing of the rule to show cause why an order should not be made by this court to preserve the *status quo* until the termination of the appeal taken by the defendants to the appellate court, it appearing to the court from the evidence taken in open court that the terms of the decree filed in this case have been violated, and that the defendants contemplate the further violation of the same, it is now ordered that the said defendants, and each and every of them, their agents and employes, preserve the terms of the said decree until the determination of the appeal for which a bond has been filed in this case, and the said defendants are hereby enjoined and restrained from doing any of the acts forbidden in said decree until the final determination of the appeal.

The rules and practice of an express company to refuse to receive packages of specie and currency for transportation from a bank which has a burglar-proof vault and adequate facilities in the city where the packages were tenedered to keep them safely over night, on the day preceding departure of the only trains which carried express matter to the destinations of the packages, and which left at various times between 6:29 and 8 in the morning, are held, in Platt v. Lecocq (C. C. A.) 158 Fed. 723, 15 L.R.A. (N. S.) 558, not to be unreasonable, unlawful, or unjust.

A bank which collects checks cashed by it on forged indorsements is held, in Tibby Bros. Glass Co. v. Farmers' & M. Bank, 220 Pa. 1, 69 Atl. 280, 15 L.R.A. (N. S.) 519, not to be liable for money had and received for the use of the payee, where the rule is that no contractual relation exists between the payee and drawee of an unaccepted check; and the fact that the payee credits the drawers with the amount of the checks is held to be immaterial.

The right of a purchaser under a contract for a deed to maintain a bill for the removal of a cloud on the title of the property is sustained in Coel v. Glos, 232 Ill. 142, 83 N. E. 529, 15 L.R.A. (N. S.) 413.

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In the Court of Common Pleas of Lackawanna County.

No. 1, May Term, 1907.

Equity.

Exceptions to Fndings of Fact and Law.

John W. Pellio vs. The Bull's Head Coal Co., et. al.

When a court of equity has obtained jurisdiction for one purpose, it may retain it for general relief, as it is desirable to avoid multiplicity of suits.

General relief is allowed when the specific thing asked for cannot be done for some reason or another.

Mr. S. B. Price, for plaintiff.

M. C. Comegys, for defendants.

Opinion by Edwards, P. J., August 19, 1908.

Exceptions were filed by both parties. Those of the defendants relate in the main to the merits of the case generally. In a review of the controversy we are unable to change our findings, either of fact or law.

Some of the exceptions presented by the plaintiff require a brief discussion. His counsel claims that there should be a decree of some kind against the defendant Whiteford who should not be allowed to escape the consequences of the fraud consummated through his agency. We cannot sustain this exception. A mere statement of the facts shows the reason why. Plaintiff's five shares of stock were purchased by the other defendant, the coal company, not by Whiteford. The stock was paid for by the company's check. Except in common with the other stockholders Whiteford derived no personal benefit from the transaction. According to the evidence whatever he did was done for the company.

Plaintiff claims also that we should make a finding from the evidence as to the value of the five shares of stock so as to determine the damages to which the plaintiff would be entitled in money. This claim is based on the general principle that when a court of equity has obtained jurisdiction for one purpose, it may retain it for general relief, and that it is desirable to avoid multiplicity of suits. The principle relied on would apply with greater force if the defendant coal

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company had put it out of the power of the court to grant the specific and particular relief prayed for by the plaintiff. Let us examine the prayer of the plaintiff's bill.

1. That the assignment of plaintiff's stock be cancelled.

This prayer in effect is granted.

2. That defendants be ordered to make full discovery of the matters stated in the bill and make a true account of the business transactions of the company.

The purpose of this prayer is fulfilled in the evidence. There is a full disclosure of the accounts of the company.

3. That the defendants be decreed trustees of the stock for plaintiff.

This relief in substance is allowed.

4. That the defendants, one or both, be ordered to re-assign and re-deliver the shares of stock to the plaintiff on payment by him of one thousand dollars and interest.

This is the specific relief to which the plaintiff is entitled.

5. That an injunction issue.

6. General relief.

It is clear that the plaintiff ought to be reinstated in his right as stockholder of the defendant coal company. The only way this can be done is by the company issuing to him his five shares of stock on payment by him of the money received for them. This is the particular thing that he requests shall be done, and the company is in a position to comply with his request. We have the right to believe that the plaintiff wants his stock and nothing else. He does not ask for the value of the stock. It is true he asks for general relief; but general relief is allowed when the specific thing plaintiff asks for cannot be done for some reason or another. The plaintiff, in the first instance, is entitled to his stock. Failing to secure the stock, he is then entitled to the value of it.

Having in view the extensive power of a court in equity we have concluded to hold the present case within our grasp until the plaintiff receives either his stock or the value thereof in money.

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To the extent herein indicated plaintiff's exceptions are sustained. All other exceptions of plaintiff and defendants are overruled, except as to costs. The disposition of the costs is reserved until final decree.

We, therefore, make the following

Interlocutory Order:

The Bull's Head Coal Company, defendant, through its proper officers, is hereby directed and commanded to transfer and re-assign, or issue to John W. Pellio, the plaintiff, the five shares of the capital stock of said company, assigned or surrendered to the said company by the plaintiff on August 17, 1906, on the payment by the plaintiff to the said company of the sum of one thousand dollars with interest from August 17, 1906, to March 18, 1907. This order is to be complied with within thirty days after its date.

Should the foregoing order be complied with a proper final decree may be entered. Should the defendant company refuse to comply with said order, then such further proceedings may be taken as will lead to a final decree.

A 2-cent passenger-rate act is held, in Pennsylvania R. Co. v. Philadelphia County, 220 Pa. 100, 68 Alt. 676, 15 L.R.A. (N. S.) 108, to violate a constitutional provision forbidding the legislature to do injustice to the corporators of the railroad company by the alteration of rates when, although not amounting to actual confiscation, it has an inevitable tendency thereto.

A street railway company is held, in Riley v. Rhode Island Co. (R. I.) 69 Atl. 338, 15 L.R.A. (N. S.) 523, not to be liable for injuries to a passenger who slips upon snow and ice accumulated during a storm upon a step after the car has started upon a trip.

So, also, the right of a state to adopt regulations to prevent the spread of diseases among plants is sustained in State ex rel. Hawley v. Nelson (S. D.) 115 N. W. 93, 15 L.R.A. (N. S.) 138, where Congress has not assumed charge of the matter as involved in interstate commerce.

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In the Court of Common Pleas of Lackawanna County.

No. 32, September Term, 1908.

In Equity.

Motion for Preliminary Injunction.

The Delaware & Hudson Co. vs. The Borough of Olyphant.

It is an elementary proposition that an easement is a valuable property right and as such it is within the protection of the constitution, as well as the general borough act of April 3, 1851. By special statutes plaintiff had an apparent right to hold certain lands and tenements, as well as the right to build and maintain a railroad in connection with the use and enjoyment of the land.

Held: Its right to acquire and hold, includes the right to use and enjoy the land for any purpose to which it may be adapted, not inconsistent with its lease.

By a grant plaintiff apparently acquired an easement in every part of the surface which it might be considered necessary to use in connection with its mining operations.

Held: The subsequent plotting of the surface was subject to plaintiff's rights in that regard. Those rights were not divested by the mere enactment of a borough ordinance adopting the streets. The plaintiff's easement is a right of private property, to the uninterrupted use and enjoyment of which it is entitled as against the borough so long as it has not been surrendered by its own act or appropriated to public use according to law.

Where the attitude of a borough threatens the repeated disturbance of the plaintiff in the use of its easement, a bill for an injunction is the proper remedy; and the plaintiff's right appearing to be clear as against defendant, it is entitled to be protected by special legislation.

Messrs. Welles & Torrey, for Plaintiff.

Mr. F. M. Lynch, Borough Solicitor, for Defendant.

Opinion by Newcomb, A. L. J., October, 1908.

The prayer of this bill is for an injunction to restrain defendant from interfering with the erection of a trestle to be used in connection with plaintiff's mining operations in Olyphant. Motion for a preliminary writ was made when the bill was filed and thereupon a rule to show cause was granted returnable August 31st. At that time defendant moved to quash the bill because the notice endorsed thereon required an answer within fifteen instead of thirty days, as provided by the equity rules. Plaintiff asked leave to amend in that particular, the hearing then proceeded, and, later formal motion to amend the notice was made and allowed with defendant's consent. There being no dispute as to the alleged interference by the borough with the plaintiff's work, nor as to the defendant's purpose to persist in such interference,

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there is left for consideration the objections raised by defendant at the close of the testimony. The first three go to the right of the plaintiff to maintain its bill in view of the fact that it appears to be combining the business of mining coal with that of a common carrier. This it is claimed brings the plaintiff within the prohibition of Section 5, Art. 17, of the constitution of this state, and the relief asked for is therefore claimed to be in aid of a violation of law. It is also claimed, as set out in the fourth reason, that plaintiff is doing business contrary to public policy and the federal statutes in that it is one of the constituent factors of a combination forming a monopoly of the business of mining and transportation of anthracite coal.

The fifth reason is that plaintiff has no charter from this state authorizing it to mine and transport coal as a common carrier.

In addition it is further contended that, regardless of the plaintiff's legal status, the borough was in the lawful exercise of its authority and the discharge of its duty in the premises, because the trestle amounted to an obstruction of a public street.

At present we cannot deal with the precise issue between the parties because that has not been formally defined by answer. Sufficient appears, however, to warrant the finding of the following

FACTS.

1. It is agreed that the plaintiff is a common carrier and that its former name was "The President, Managers and Company of The Delaware and Hudson Canal Company." The argument on both sides assumes that by its former name the plaintiff was incorporated by and under the laws of the state of New York. That fact is not shown except by way of recital in a special statute of this state, to wit: Act of April 1, 1825, chap. 78. This is a supplement to an act of March 13, 1823, chap. 61, granting certain franchises to Morris Wurts, his heirs and assigns, respecting the improvement of the Lackawaxen river for navigation, etc. The act of 1825 gave much the same rights and privileges to the canal company subject to the consent of Wurts.

2. So far as in evidence the further legislation of this state relating to the powers, privileges and liabilities of the company are the following:

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Act 9 February, 1826, chap. 8.
Act 5 April, 1826, chap. 67.
Act 12 March, 1859, chap. 123.
Act 20 September, 1866, chap. 144.

3. The act of 5th April, 1826, authorized the company "to construct and maintain such railways or other devices as may be found necessary to provide for and facilitate the transportation of coal to the canal by them to be constructed; Provided, that no railway hereby authorized to be made shall be extended further that from the coal beds owned by the said company to the forks of the Dyberry on the west branch of the river Lackawaxen; or from the coal beds aforesaid to that point on the Wallenpaupack branch of the river Lackawaxen, where it is crossed by the Easton and Belmont turnpike road," etc.

4. By the supplement of 12th March, 1859, the company was authorized "to extend their railroads with the necessary branches and fixtures from the present terminus in the township of Blakely, Luzerne County, to any part of the adjoining township of Providence, in said County of Luzerne, and to any lands now owned or that may be hereafter purchased by them under the provisions of this act," etc.

The same act authorized the company "to purchase and hold an additional quantity of 3,000 acres of land in the townships of Fell, Carbondale, Blakely and Providence, in the County of Luzerne, for the purpose of carrying on their operations."

5. By the supplement of September 20, 1866, it was provided that damages for which the company "may be liable from the construction of their works as the same now are or hereafter may be extended shall be secured and assessed in the manner provided by the act of assembly entitled 'An act regulating railroad companies,' approved the 19th day of February, A. D. 1849, and the supplements thereto."

The act of 1866 further authorized the company to purchase and hold 5,000 acres of land in Luzerne County. The only positive restriction as to the kind and character of the business that the company may do in this state to be found in these statutes is contained in sec. 4, of the act of 1825. This is a restriction as to banking and manufacturing.

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6. This county was erected out of a part of Luzerne in 1878. Some two years before that the borough of Olyphant has been created out of a part of the township of Blakely and organized under the general borough act of April 3, 1851. These facts do not affirmatively appear, but as they were so assumed by counsel at the hearing it is felt that no harm will be done by taking judicial notice of them.

7. It is not disputed that the plaintiff and its immediate predecessor in title have since 1853 held, and been engaged in mining the coal under the Pierce warrantee tract in the township of Blakely—now the borough of Olyphant—together with surface rights exercised in connection with the mining operations; that these rights were acquired by grant from William Hull, the former owner; that in 1858 he demised the coal to Abel Barker and others to be held until "all veins of suitable character" were mined out; that by its terms the lease was made subordinate to a contract which the lessees then had to furnish the coal to the plaintiff company; and that the right of the lessees to assign the lease to the plaintiff was therein expressly mentioned. The leasehold rights were so assigned in 1864. Both papers were duly recorded in Luzerne county. As between the parties to it the lease is still operative. The grant from Hull includes the "right of way across said tract for every description of necessary road and also the use and enjoyment in the fullest manner of such portion of the surface of said tract as may be required for the erection of all necessary shops, barns, offices, engine houses, etc., and for the deposit of props, culm or other material accumulated in their business," &c. The area of the tract is not shown but it is believed to be about 400 acres.

8. Some years after the demise to Barker and others Hull plotted a portion of the surface into village lots with streets and ways. Two of these were Short and Thirteenth, also called respectively Second and Third streets. What, if anything, was ever done by him to open or define the streets on the ground does not appear. There is evidence that some work, indefinite in character, was done some years ago on a portion of Thirteenth street by a street commissioner of the borough. The neighborhood is only sparsely built up and at the point in question nothing appears to have ever been done to lay out or improve the streets. Indeed such travel as there is in that direction leaves the course of

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Thirteenth street before reaching that point and takes it way across the open fields, apparently because that is the line of least resistance.

9. The trestle in question was projected by the plaintiff's engineers upwards of a year ago, in connection with a new opening deemed necessary to get out a portion of the coal. It is designed to cross Thirteenth street, as plotted, diagonally at an elevation of about fifteen feet in order to carry cars conveying the rock and other waste from the new opening to the dumping grounds on another portion of the tract. The work of construction was stopped in August by the borough officials acting by authority of the council. The workmen were arrested and prevented from going on with the work by being threatened with further arrest, the borough claiming the structure was a nuisance. This claim is based on the effect of a borough ordinance of April 7th this year. The ordinance is as follows: "Section 1. That Second street between Valley avenue and Agnes avenue, in the first ward of the borough of Olyphant and Third street between Valley avenue and Avenue E in the first ward of the borough of Olyphant be and they are hereby adopted as public streets of the borough of Olyphant."

No other corporate action in the premises has ever been taken by the borough.

CONCLUSIONS OF LAW.

1. Under the special statutes referred to the plaintiff has the apparent right to hold the lands and tenements granted by the Hull lease. as well as the right to build and maintain a railroad in conection with the use and enjoyment of the land. Except as excluded from banking and manufacturing, its right to acquire and hold, includes the right to use and enjoy the land for any purpose to which it may be adapted, not inconsistent with its lease. Hence, it has the apparent right to mine out the coal.

2. Whether the extent and character of plaintiff's franchises have been affected by the consitution of 1874, as claimed by defendant's first three objections, is a question entirely outside our jurisdiction in this case. It cannot come before us for consideration as between the present parties.

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3. As to the fourth objection to the motion for injunction it is enough to say that it rests wholly on an assumption of fact of which there is no evidence, and is, therefore, untenable.

4. So much of the fifth objection as goes to plaintiff's rights as a common carrier is irrelevant. No such right is involved in the case.

5. By the grant from Hull the plaintiff apparently acquired an easement of way in every part of the surface which it might be considered necessary to use in connection with its mining operations. The subsequent plotting of the surface was subject to plaintiff's rights in that regard. Those rights were not divested by the mere enactment of the borough ordinance adopting the streets in question.

6. The plaintiff's easement is a right of private property, to the uninterrupted use and enjoyment of which it is entitled as against the borough so long as it has not been surrendered by its own act or appropriated to public use according to law. The ordinance did not effect such appropriation.

7. As the attitude of the borough in the premises threatens the repeated disturbance of the plaintiff in the use of its easement, bill for an injunction is the proper remedy; and the plaintiff's rights appearing to be clear as against the defendant, it is entitled to be protected by special injunction.

ORDER.

The rule to show cause is, therefore, made absolute and a preliminary injunction awarded as prayed for pending final hearing or until the further order of the court, upon security being given in the sum of five hundred dollars to be approved by the court or a judge thereof, and conditioned according to law to indemnify the defendant.

DISCUSSION.

Perhaps the case calls for no discussion at this time. It may not be improper, however, to say that most of the questions sought to be raised by the defendant can only be examined at the suit of the Commonwealth. If they were capable of being tried as between these parties a preliminary injuction would not be granted. Even the limited jurisdiction to inquire in to the existence and character of corporate

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franchises which equity has under the act of 19th June, 1871, P. L. 1361, can only be exercised at the suit of a party seeking affirmative relief upon suitable pleadings. Defendant's attempt here to challenge the plaintiff's rights derives no support from that source. Being a foreign corporation, the plaintiff must, it is true, show its power to take and hold title to the lands and appurtenances in question. Such power it does show, without limitation as to the use and enjoyment of its lands except for banking and manufacturing. More than that, if more were needed, certain of its enabling acts distinctly recognize the business of coal mining as the business in which the company was to engage. It had statutory authority to acquire and hold lands in Luzerne County to the extent, at least, of eight thousand acres. No question is raised as to any attempt to exceed that limit, nor can it be raised in this proceeding. It had authority to build and maintain a railroad for the transportation of its coal. But the bill doesn't call for any showing of its rights and powers as a railroad company, either as a private or common carrier. The right which it asserts here is the right to the use and enjoyment of certain of its lands and tenements in accordance with the terms and purposes of the grant under which they are held. The injury which it seeks to prevent is the taking of some part of this property for public use without due process of law and just compensation. This brings us to the decisive question in the case, namely, the effect of the borough ordinance adopting parts of the streets therein named, as public streets. For if that be effective to extinguish the plaintiff's surface rights then it has no case for specific relief, and must resort to its remedy at law for damages; so, too, if the effect of the ordinance in that regard be doubtful such relief would only be granted, if at all, on final hearing. But in my judgment the question is free from doubt.

The ordinance is in no sense a condemnation proceeding. It is nothing more or less than an acceptance of Hull's gift. The borough could accept what Hull offered to give. But he could give only what he had. It must be presumed that he only intended to dedicate the streets subject to the existing rights of the plaintiff. Of these the borough must be presumed to have had notice, the plaintiff's title being of record and its physical possession notorious. So far as concerned Hull

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no condemnation was needed. The ordinance was all that was required to take over what he freely gave. Obviously no two legal conceptions can stand more distinctly opposed to each other than an acceptance of land thus dedicated and an appropriation by right of eminent domain, the one resting on the voluntary act of the owner; the other on a seizure by the sovereign power of the state against the owner's will. The ordinance purports to take nothing in that way. It would form no basis for a preceeding to assess damages. Should the plaintiff attempt to recover damages upon the theory that its property has been appropriated, the defense could be successfully made that its rights were not divested by the ordinance.

Corey v. Boro., 18 Pa. Sup. Ct., 216.

That the plaintiff's easement is a valuable property right is an elementary proposition calling for no citation of authority. As such it is within the protection of the constitution as well as of the general borough act of April 3, 1851, P. L. 326, sec. 27. This provides that: "The powers and duties of the corporation shall be subject to the following provisions: 1. Private property shall not be taken for the use or purpose of the corporation without the consent of the owners, or until just compensation shall be made therefor according to the laws of this commonwealth."

These considerations are decisive in favor of the motion.

A real-estate agent authorized by express contract to sell property at a certain price is held, in Ball v. Dolan (S. D.) 114 N. W. 998, 15 L.R.A. (N. S.) 272, to have no right to recover on a *quantum meruit* for the value of his services in finding a purchaser who pays less than that sum, where the owner receives no benefit from the agent's services, although the agent is present and assists in the sale, and the owner changes the price.

The right of a state, in the exercise of its police power, reasonably to regulate the hours of labor of employees on interstate railroads, in the absence of Federal legislation on the subject, is sustained in State v. Northern P. R. Co. (Mont.) 93 Pac. 945, 15 L.R.A. (N. S.) 134.

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In the Court of Common Pleas of Lackawanna County.

No. 36, September Term, 1908.

Equity.

Rule for an Injunction.

Albert G. Hollister vs. The Erie & Wyoming Valley Railroad Company

The right of an upper riparian owner to divert the waters of a stream for manufacturing or other purposes having no necessary relation to his use of his land, is limited as between himself and a lower proprietor, to so much of the water as will not materially or sensibly diminish its quantity.

Uncertainty as to plaintiff's right to equitable relief and long delay in applying for it, make it obligatory upon the court to refuse a preliminary injunction.

An injunction is not of right. It will not be issued when, upon a broad consideration of the situation of all parties interested, good conscience does not require it.

Messrs. I. H. Burns and L. A. Watres, for plaintiff.

Messrs. Willard, Warren & Knapp, for defendant.

Opinion by Carpenter, A. L. J., October 12, 1908.

It appears in this case that the plaintiff is, and for a long time has been, the owner of a lot of land on Wallen Paupack creek in Wayne County, upon which he and his predecessors have for a period of seventy years maintained a grist mill, the power for which is supplied by water from said creek.

The Erie Railroad Company, which it was agreed at the hearing might be added as a defendant, has erected a large tank at the village of Saco and another at Wimmers, in Lackawanna County, into which it pumps water from the said creek and its tributary at points above the plaintiff's mill, for the purpose of supplying the same to the engines which are used on its road. These tanks were constructed, and this pumping of water from these streams began in or about the year 1886 in the manner and substantially to the same extent to which it has since been carried on. So far as appears the plaintiff has made no objection to this use of the water, except that in 1903 he brought an action of trespass against the Erie and Wyoming Valley Railroad Company and filed a declaration claiming damages from the said company for diverting the water of said stream; but the case has not been brought to trial.

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The plaintiff claims that the taking of water from the stream so diminishes the flow to his mill that it seriously interferes with the running thereof, and he asks that an injunction be granted restraining the defendant from so diverting the water.

Witnesses who were called by the defendant, and who had made examinations of the streams and measurements of the current, gave it as their opinion that the quantity of water taken by the defendant is not sufficient to have any appreciable effect upon the running of the plaintiff's mill; that at most it would not, if permitted to flow uninterrupted, be sufficient to make a difference of more than a few minutes each day.

It is apparent from the evidence that the quantity of water diverted is not enough to make any material difference to the plaintiff's mill, unless it be in time of drought; and even then the difference is so slight that it can scarcely be expected that the law will notice it. The right of an upper riprarian owner to divert water of a stream for manufacturing or other purposes having no necessary relation to his use of his land, is limited as between himself and a lower proprietor, to so much of the water as will not materially or sensibly diminish its quantity. Clark v. Railroad Co., 145 Pa. St., 438; Miller v. Miller, 9 Pa., St., 74; Wheatley v. Chrisman, 24 Pa. St., 298.

These cases, and many others which might be referred to, recognize the right of an upper riparian owner to divert the water of a stream to some extent, so long as it does not materially lessen the flow to the lower proprietor. This being the rule, and the evidence showing such a slight diversion of the water, and in view of the length of time during which this has gone on it seems clear that this is not a case for a preliminary injunction. An injunction is not of right. It will not be issued when, upon a broad consideration of the situation of all the parties in interest, good conscience does not require it. A court of equity demands reasonable diligence on the part of those seeking its aid, and discourages laches by making it a bar to relief. Therefore a plaintiff, on filing his bill for an injunction, must make it appear that he has used reasonable diligence in invoking the aid of the court, otherwise the relief will be denied. 10 Am. & Eng. Ency. of Law, 802. The mere lapse of time, independent of the statute of limitations, may be a

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sufficient ground for denying an injuction unless a legal excuse for such delay is shown. A clear right and the prompt assertion of it is the rule.

A suitor who by laches has made it impossible for a court to enjoin his adversary without inflicting great injury upon him will be left to pursue his ordinary legal remedy. Stewart Wire Co. v. Lehigh Coal & N. Co., 203 Pa., 474.

It is not necessary, neither would it be proper at this time, to consider the question whether the defendant has acquired the right by prescription to use the waters of this stream. The settling of that controversy, when it arises, may involve a consideration of the question as to whether the defendant has succeeded to the alleged right of the Pennsylvania Coal Company to divert the water, as well as other matters which need not now be considered.

The uncertainty as to plaintiff's right to equitable relief, and his long delay in applying for it, make it obligatory upon us to refuse the preliminary injunction, and the rule is therefore discharged.

That a carrier has chartered a train and given the charterers the sole privilege of collecting fares and fixing their amount is held, in Kirkland v. Charleston & W. C. R. Co. (S. C.) 60 S. E. 668, 15 L.R.A. (N. S.) 425, not to exempt it from liability for the ejection of a passenger therefrom, on the ground that the charterers in so doing are the agents of the carrier, which cannot by contract relieve itself from liability for their wrongful acts.

A building and loan association is held, in St. John v. Iowa Business Men's B. & L. Asso. (Iowa), 113, N. W. 863, 15 L.R.A. (N. S.) 503, not to be able, upon the ground that it impairs the obligation of existing cantracts, to question the constitutionality of a statute which limits interest and premium to be charged borrowers to 8 per cent. per annum, and provides that, in case of the amendment of the articles of incorporation, all reductions of the rate of interest or premium shall be made to apply to members who have borrowed from the association prior to the adoption of the act, where the association has amended its articles to conform to the act.

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In the Court of Common Pleas of Lackawanna County.

No. 511, November Term, 1908.

Rule for a New Trial.

Annie Gates vs. Richard Little.

The sufficiency of a declaration should be attacked by a demurrer. It cannot be attacked at the trial after plea in bar has been entered.
It is not error to allow proof of damages subsequent to bringing of suit.
The plaintiff asserted in her declaration that "her business of dressmaking and sewing had been injured," by the publication of the libel.
Held: Loss of earnings is a special loss.

Messrs. J. J. O'Malley and H. M. Mumford, for plaintiff.

Messrs. John F. Scragg and C. P. O'Malley, for defendant.

Opinion by Kelly, A. L. J., January 7, 1907.

There are sixteen reasons assigned for a new trial, all of which we will briefly refer to. The first, second, third and fifth relate to the same legal question and may be discussed together. In them the claim is made that inasmuch as the alleged libelous article did not refer to the plaintiff by name, and in the declaration there was no innuendo or colloquim to the effect that the article referred to her, no evidence aliunde could be offered to show that it did, or that it could reasonably be inferred that it did, refer to her; and that it was erroneous to submit such evidence to the jury to be considered by them in connection with the article, that they might determine whether it did refer to the plaintiff or whether it might be reasonably inferred that it did. That the article is libelous per se is not disputed, but it is claimed that it did not in fact refer to the plaintiff, and that it could not reasonably be inferred that it did.

The declaration alleges that the article, which is set out in full, was published "of and concerning" the plaintiff, and it contains the following averment: "And the said affiant says that she is the person referred to in said article as the cruel and heartless and not overly virtuous daughter, etc., and is the person meant to be attacked throughout the entire article, and is so understood to be by all the people living in the neighborhood who read the said libelous publication." We think this is amply sufficient, at least as far as this rule is concerned. The plea of the defendant was "not guilty" and the case went to trial on the

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merits. If the counsel desired to attack the sufficiency of the declaration they should have demurred. Its sufficiency could not be attacked at the trial after a plea in bar has been entered: Haldeman vs. Martin, 10 Pa., 369; Thompson vs. Barkley, 27 Pa., 263. It certainly contained the substance of a good cause of action and is good after a verdict upon the merits.

The fourth reason calls for no comment. The point which we affirmed contains a fair statement of the law as applicable to a case of this kind. The proposition that actual malice need not be established affirmatively and that actual damages need not be proven, when the article is per se libelous needs no citation of authority to sustain. The sixth reason presents the contention that the defendant was entitled to binding instructions and we do not feel called upon to discuss it. Neither do we care to discuss the seventh and eighth, which allege that the verdict was against the weight of the evidence and was excessive. The ninth reason is that there was no proof of publication by the defendant of the alleged libelous article. As to this it is sufficient to say that it was shown by calling the defendant for cross examination that he was the proprietor and editor of "The Scrantonian;" and that it had a large circulation in Peckville, where the plaintiff resides and throughout the county. A copy of "The Scrantonian" of the issue of September 17, 1905, was offered in evidence without objection, which copy contained the alleged libelous article. When the paper was offered the objection that no proof of its publication had been made should have been set up. The whole case was tried upon the theory that the publication was admitted and this point was not raised at all at the trial. Furthermore, the defendant when called in own defense testified that he had been publishing "The Scrantonian" between nine an ten years.

In the tenth reason it is claimed that we erroneously applied the provisions of the Act of May 12, 1903, P. L. 349, because the newspaper in which the article was published was a weekly Sunday newspaper. It is urged that the Act does not apply to a weekly newspaper. The Act applies to any civil action which may be brought against the proprietor, etc., of "any newspaper published in the commonwealth." It is true that following that sweeping clause we find these words: "Whether the

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same be published monthly, bi-weekly, semi-weekly, or daily;" but they are words of descriptions merely and do not take anything away from words first quoted. As was said by the Governor of the Commonwealth in giving his reasons for the approval of the bill, "the omission of the word 'weekly' was unwise but in no sense fatal." The plain intention of the Act is to apply to all newspapers.

The eleventh reason is that we erred in admitting evidence of special damage under the pleadings. In the declaration the plaintiff avers that "her business of dressmaking and sewing has been injured." This is a claim for special damages. Loss of earnings is a special loss which does not necessarily result from the publication of a libel, although it naturally and probably may result. The twelfth is somewhat misleading. We did not rule at the trial that witnesses might give their opinions as to whom the article referred. We allowed all the facts to be shown as the residence, occupation, habits, associations, etc., of the plaintiff, and as to an episode which had occurred between her and her mother a short time before the publication complained of, so that the jury might find whether the article referred to her. This is complained of in the thirteenth reason, but the complaint is not worthy of any comment.

The fourteenth reason is that we erred in refusing to admit in evidence an article which appeared in the same newspaper upon the Sunday immediately previous to the publication of the article complained of. The rejected article is set out in full in the notes of testimony beginning on page 116. A perusal of it will show that it had no reference whatever to the article complained of. It does not tend to explain in any degree the alleged libel and its admission could have no effect whatever except to befog the issue before the jury.

The fifteenth is that it was error to allow proof of damages subsequent to the bringing of suit. It was clearly proper to so. The plaintiff could not maintain more than one suit, so she should recover all damages, including probable future damages in it. The same rule applies to an action for libel as applies to an action to recover for personal injuries, in this respect.

The last reason is that we erred in admitting the testimony of Mrs. Martha Davis under the offer found on page 49 of the notes of testi-

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mony. This ruling is vindicated by the ruling of the Supreme Court in the case of O'Toole vs. Post Printing, etc., Co., 179 Pa., 271. The evidence was admitted in support of the averment of special damages to show the injurious effect of the publication. The offer was to show by the witness that she read the article and knew of others who read it about the time of its publication and had heard comment upon it unfavorable to the plaintiff.

Upon a careful review of the whole case we have not been persuaded that we committed any substantial error to the defendant's prejudice. The case was for the jury under all of the circumstances we think it would not be proper to set aside the verdict. The rule is discharged.

The right of a broker to commissions for procuring a loan to be secured by mortgage of real estate is sustained in Silberberg v. Chipman (Colo.) 93 Pac. 1130, 15 L.R.A. (N. S.) 187, although it is not completed because the lender, who is to be furnished with marketable title, demands an idemnity bond against mechanics' liens the time for filing which has not elapsed, and refuses to take an inadequate cash deposit and written evidence that no liens exist in lieu of the bond.

The statute of limitations is held, in Webster v. Pittsburg C. & T. R. Co. (Ohio) 84 N. E. 592, 15 L.R.A.(N.S.) 1154, not to start to run against the right of remaindermen to institute proceedings to compel appropriation by a railroad of property of which it had taken possession without title, until the death or other termination of the estate of the life tenant.

A provision in a lease that, if the lessor cannot deliver possession as contemplated, delay in delivery of possession will not work an abridgment of the term, but shall operate to defer the date of its commencement, was held, in Johnston v. Corson Gold Min. Co. (C. C. A.) 157 Fed. 145, 15 L.R.A.(N.S.) 1078, not to change the character of the conveyance from an executed to an executory contract.

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In the Court of Oyer and Terminer of Lackawanna County.

No. 10, October Sessions, 1908.

Motion for a New Trial.

Commonwealthh vs. Nicholas DeMarzo.

A declaration made by a prisoner to his victim on the day of the killing is admissable as evidence.

Where there is no evidence that the defendant suffered from maniacal outbursts, the court will not instruct the jury that if the defendant killed the deceased while under a spell or influence of a maniacal outburst he could not be convicted, although he knew his act was unlawful and that he knew the difference between right and wrong.

Mr. Joseph O'Brien, District Attorney, for plaintiff.

Messrs. M. J. Martin and George H. Rice, for defendant.

Opinion by Edwards, P. J., November 9, 1908.

While there are several reasons assigned for a new trial, two only were argued by counsel. The first relates to the admission of evidence. The coroner testified that the deceased woman was pregnant when she was killed. This fact was admitted because it was connected with a declaration made by the prisoner to the woman on the day of the killing. It may have been admissable also as a part of the history, the *res gestae* as it were, of the autopsy. At any rate, it was admissible on one ground or the other; and, as we believe, on both.

The other error complained of involves the part of the charge relating to the defense of insanity. It is claimed that we should have intsructed the jury, in addition to our other instructions, that if the defendent killed the deceased while under the spell or influence of a maniacal outburst, he could not be convicted, although he knew his act was unlawful and that he knew the difference between right and wrong. We did not feel called upon to give such instructions under the facts of the case any more than we did as to manslaughter. It is true that we affirmed several points relating to maniacal outbursts. These points were based on the expert opinion of doctors; but there was no evidence that the defendant at any time actually suffered from the violent outbursts referred to.

It is true that some years ago he had spasms, probably of an epileptic character; but these were quite infrequent in the last two years. In the history of defendant's life since he came to this country, particular-

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ly since he married the woman he killed, there was nothing to indicate that he was the subject of sudden maniacal outbursts. And his conduct during the whole of the day on which the homicide occurred shows that he was cool, rational and in full control of his acts. The evidence shows that he had been in the habit of locking his young wife in the house. On the morning of the day of the killing he went to work as usual. About ten o'clock he was informed that his wife had left his house and had gone to her sister's house. He left his work then and walked home. He changed his clothes, took the revolver out of a bureau drawer, put it in his pocket and went to seek his wife. Finding her in her sister's house he had an interview with her which lasted from a quarter to a half an hour. He tried to prevail on her to return home. She refused, giving as a reason that it was not safe for her; that he had beaten and abused her and had threatened to shoot her more than once. He then left and came back in the afternoon, when he had another interview with his wife similar in character to the first. At the end of this interview, when the sister had just stepped out of the door he cooly took the revolver out of his pocket and shot his wife. He then went back to his own house and put the revolver in the pocket of another coat. He was soon arrested and his actions from that time until he reached the county jail were that of a person who knew full well what he had done and why he did it. There was not the slightest indication of a passionate outburst of any kind in his conduct, either at the time he was informed that his wife had left his house, or at the morning interview, or at the afternoon interview, or immediately before and after the shooting, or from that time until he was placed in jail.

The defendant had a fair trial. He was well defended, and the verdict of the jury is justified by the evidence. The motion for a new trial is denied and a new trial is refused. An exception is noted for the defendant.

Failure to present a check in due course for payment is held, in Start v. Tupper (Vt.) 69 Atl. 151, 15 L.R.A. (N. S.) 213, to discharge the indorser, even though such presentment would have been unavailing, in the absence of affirmative proof that he knew when he passed the check that there would be no funds in the bank to meet it.

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In the Orphans' Court of Lackawanna County.

No. 646, Year 1905.

Sur Exceptions to Inventory.

In Re: Estate of Richard J. Gordon, Deceased.

An inventory should contain a specific enumeration of the goods, chattels and credits of the decedent; and if general instead of specific in its details will be set aside.

Messrs. Joseph O'Brien & W. J. Fitzgerald for exceptant.

Messrs. S. B. Price and J. F. Murphy, for administrator.

Opinion by Sando, P. J., March 30, 1908.

The decedent, Michael J. Gordon, died October 1st, 1905, leaving to survive him a widow and a minor child, and letters of administration on the estate were granted to Thomas P. Gordon. In response to a citation the administrator filed an inventory and appraisement on November 11th, 1907.

The exceptant being the widow, is interested in the faithful management of the estate, and a proper party to invoke the interposition of the court for the protection of her interests.

An examination of the paper filed, demonstrates that the administrator has failed to file a true and perfect inventory and appraisement of the personal estate of the decedent.

One of the most important duties incumbent upon an administrator, involving equally his own protection and that of the estate committed to his care, is the making of an accurate inventory. It should not only be full and complete, so as to include every item of property belonging to the estate, but it should set out each item separately, with the amounts indicating the value or appraisement in detail. The itemizing of each article, rather than grouping or aggregating them and stating the value or amount in the sum, is not only a question of policy addressing itself to the judgment of the one managing an estate; it is a legal obligation.

The act of the 15th of March, 1832, P. L. 135, section 15, requires the administrator "to make a true and perfect inventory of all the goods, chattels and credits of the deceased" so far as he may know or ascertain them; and the 26th section of the same act, requires him to

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cause a just appraisement to be made of such goods, chattels and credits

In Bradford's Case, 1 Browne, 87, the court said: "The administrators, by the very terms of the bond, are required to file 'a true and perfect inventory' of the goods, chattels and credits of the deceased."

An inventory is a list, schedule, or enumeration in writing, containing, article by article, the goods and chattels, rights and credits: 11 Am. & Eng. Ency. of Law, 812. It should be carefully made, as it is the basis of the whole future business of settling the estate. It should contain a full, true and perfect description and estimate of all the personal estate of the decedent, in possession and in action, with such remarks concerning the same as may be necessary to give a true understanding of its condition and value: 5 Rhone, 27.

The form in which the inventory before us is made out and filed is exceptionable. It is not an inventory, but rather an abstract of one. It does not answer the design of the law. Justice requires that in all cases the requirements of the statute should be strictly complied with.

An inventory should contain a specific enumeration of the property; a paper containing items, thus

"Horses, Wagons, Harness .....
Groceries & Book Accounts ..... $1,000.
1 lot of Furniture ..... 500"

is not an inventory, , because of its defective character, and failure to furnish parties interested the very information it was designed to supply.

Now March 30th, 1908, it is ordered, adjudged and decreed that the inventory and appraisement filed November 11th, 1907, by Thomas P. Gordon, Administrator, be set aside.

That one who orders grain for future delivery intends the transactions to be mere wagers is held, in Hallet v. Aggergaard (— S. D. —) 114 N. W. 696, 14 L.R.A.(N.S.) 1251, not to deprive the broker of his commissions, where the latter buys in good faith, contemplating actual delivery.

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In the Court of Common Pleas of Lackawanna County.

No. 3, November Term, 1908.

Equity.

Motion for a Preliminary Injunction.

John E. Regan vs. The City of Scranton, et. al.

Whether a contract for land required by a city for its public purposes is within the prohibition of the Act of 7th March, 1901, P. L. 20, Sec. 1, Art. XV., is by no means free from debt.

A preliminary injunction will not be granted except where the plaintiff's right is clear both on the law and the facts.

No new, doubtful or difficult question of law will be decided on a rule for a preliminary injunction.

It is not certain that a taxpayer's bill can be maintained for the prevention of a public nuisance.

Mr. T. A. Donahoe, for plaintiff.

Mr. D. J. Davis, City Solicitor, for defendant.

Opinion by Newcomb, A. L. J., November 7, 1908.

This is a taxpayer's bill to enjoin the defendants from consummating the purchase of a building site and erecting thereon a garbage disposal plant. Relief is aked for on two grounds: First, because the city entered into a contract for the lot without advertising for proposals as required by its charter; and, Second, because the plant is so located as to constitute a public nuisance.

The bill doesn't aver that the contract price of the lot exceeds $250.00, but the evidence taken upon the rule to show cause discloses that it is $500.00. Thus, the contention is that the contract is within the prohibition of the act of 7th March, 1901, P. L. 20, section 1, article XV. THhis provides that: "All contracts relating to city affairs shall be let to the lowest responsible bidder after reasonable notice. When the contract exceeds two hundred and fifty dollars, such notice shall be by advertisement; when less than that amount, advertisement may be dispensed with."

Whether lands required by the city for its public purposes are within the object aimed at by this provision is by no means free from doubt. Manifestly the object was to give the city the benefit of competition, thus enabling it to get supplies at the lowest market prices. But it could be argued with considerable force that this had reference

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only to contracts for labor and such commodities as are the subject of commercial transactions in the ordinary competitive markets. Necessarily building sites are not so open to competition as either labor or merchandise. In procuring a suitable site for the location of a building the city must be more or less restricted in choice both by the nature of the property and the purposes intended to be served. In the absence of any judicial interpretation of this provision of the statute, the foregoing considerations raise a very debatable legal question as to whether the contract involved here is subject to the requirement as to notice by advertisement. The research of both counsel and the court has failed to find that it has ever been passed upon by any court. This is decisive against the motion so far as concerns the validity of the contract, because of the familiar rule that a preliminary injunction will not be granted except where the plaintiff's right is clear both on the law and the facts. No new, doubtful or difficult question of law will be decided on a motion for a preliminary injunction.

9 P. & L. Dig. Dec., 14089, and cases there cited.

A final injunction is a very different thing. On final hearing upon issue properly joined, if relief depends upon the construction of this statute the city may be enjoined. So much for the validity of the contract.

As to the other ground of complaint, we are not aware that a taxpayers' bill can be maintained for the prevention of a public nuisance. Aside from that the proofs here do not warrant the finding that the proposed plant will be a nuisance. That claim rests upon the opinion of witnesses based on their theory of its operation, and not upon any actual observation or experience. This claim, therefore, is as yet purely conjectural and cannot prevail. Should the plant when in operation prove to be a nuisance it can then be dealt with on that basis.

For these reasons the motion must be denied and a preliminary injunction is refused without prejudice.

The presumption of probable cause for a prosecution arising from conviction is held, in Carpenter v. Sibley (Cal.) 94 Pac. 987, 51 L.R.A.(N.S.) 1143, to be destroyed if the conviction was secured by fraud or perjury.

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In the Court of Common Pleas of Lackawanna County.

No. 57, November Term, 1908.

Action:. Feigned Issue.

George B. Schooley vs. Hulda A. Crawford, et. al.

The burden of proving a disputed will to the satisfaction of a jury, is on the plaintiff.

The exact nature of an issue, submitted for the decision of a jury, involved the validity of a will and codicil.

There were serious and irreconcilable contradictions in the testimony on very material points. Court in charging the jury said, inter alia:

"You may find some witnesses corroborated and others contradicted; you may be guided to some extent in weighing the testimony of a witness by his or her attitude upon the witness stand and his or her manner of answering questions, or of evading questions; and you will in your consideration of the many phases of this case, decide whose testimony it is that bears the impress of truth and seems the most probable, reasonable, natural and consistent when you view the evidence as a whole and when you recall to your minds all the circumstances disclosed in the testimony."

"You have no right to harbor or entertain any prejudice against any of the parties to the case. Keep your minds clear of all feeling and sentiment, except that naturally and legitimately produced by the evidence."

"In such an important case as the present one I deem it the duty of the court to charge the jury at some length. At the same time you must remember that you are the judges of the facts and of the credibility of the witnesses. It is you that must sift the evidence—compare, examine and judge the testimony of the witnesses * * * yet, it is my duty to assist you by calling your attention, in orderly sequence, to the material and salient phases of the case, so that you may deliberate intelligently and thus arrive at a righteous verdict."

"Experience and reasoning teach us that persons may have habits of spelling and of expression, and the use of an habitual expression in a disputed document may be used as a circumstance with other evidence to establish the authenticity of a document or to prove it fraudulent."

"It is a matter of common experience that a man's acts sometimes belie his words. Where they are inconsistent one may be judged by the other, and the words may be disbelieved, if the man's acts show them to be false."

"You have the right to consider all of plaintiff's acts, his conduct as disclosed by the evidence, whether in his favor or against him, as bearing to a more or less extent upon the integrity of plaintiff's contention in this case."

"When you can harmonize apparently contradictory testimony it is your duty to do so: when you cannot, you must decide whom you will believe."

"Expert testimony is proper on a proper subject and in a proper case. The act of assembly passed by the legislature of Pennsylvania, makes it proper and says in what cases and for what purpose evidence of this kind may be introduced. This act was passed in 1895."

"All evidence is proper in a court of justice, whether it be direct or whether it be circumstantial. Sometimes direct evidence is more satisfactory than circumstantial. Again, in other cases, sometimes circumstantial evidence is more satisfactory than direct evidence."

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Messrs. S. B. Price, George M. Watson and Clarence Balentine, for Plaintiff.

Messrs. Willard, Warren & Knapp, Messrs. Welles & Torrey, Messrs. O'Brien & Martin and Messrs. Patterson & Rymer, for Defendants.

Charge of the Court by Edwards, P. J., January, 1908.

Gentlemen of the Jury:—

It is hardly necessary for me to impress on your minds the importance of the case you are sworn to try. Counsel on both sides have called your attention to this fact. The amount and evident great value of the estate, the nature of the defence in part which virtually charges the plaintiff with fraud and forgery, and the determination of the testamentary intention of James L. Crawford are involved in this case. Your verdict, whatever it may be, will lead to important consequences to both parties.

At the outset, I shall explain to you how the case comes into the Court of Common Pleas. It comes to us from the Orphans' Court of this county. It appears that on February 27, 1905, a writing, purporting to be the last will and testament of James L. Crawford, was admitted to probate before the Register of Wills and letters testamentary issued to Mrs. Crawford, the widow. This will is known in this case as the Crawford will. The probate of this will was subsequently opened; and later, the plaintiff, George B. Schooley presented for probate the will and codicil offered in evidence by the plaintiff in this case, and referred to frequently as the Schooley will. Certain proceedings were then had questioning the validity of this alleged later will and the dispute has been referred to our court of common pleas for determination by the court and by a jury. An issue was then framed and approved by our court, and this is the issue which you are now trying. The plaintiff is George B. Schooley and the defendants are Hulda A. Crawford and James G. Shepherd. Your verdict will be for the plaintiff, or for the defendants, as you view the evidence. Although according to the issue as framed, a general verdict, either for the plaintiff or for the defendants, would answer the purpose of this case, I shall ask you not only to return a general verdict, but also to answer

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one specific question which is set forth in the precept of the Orphans' Court. The question is this:

Are the paper writings dated January 30, 1905, being a will and codicil thereto, the last will of James L. Crawford, or are they false and fraudulent?

You thus see, gentlemen, the exact nature of the issue submitted for your decision. It involves the validity of the will and codicil, called in this case the Schooley will.

Your verdict in this case must be based upon the law and the evidence. The law is given you by the court and you are bound to observe and follow the legal instructions thus given. You must apply the law to the facts as you shall find them, and you are expected to exercise your best judgment in judging the evidence in the light of the legal principles laid down by the court.

As to the facts you are the sole judges. The right to weigh and decide disputed questions of fact is by law vested in the jury. In judging the facts you must necessarily pass upon the credibility of witnesses. The witnesses in this case are quite numerous and there is a great volume of testimony. There are serious and irreconcilable contradictions to be found in the testimony on some very material points. Who, of the witnesses are telling the truth, and the whole truth? Who are the credible witnesses in the case? In deciding as to the credibility of a witness you have the right to consider the interest the witness may have in the result of the case. He may be a party on one side or the other and being a party he may have a bias in his own favor; or, the witness may so far ignore the truth and testify to that which is false. Not that this necessarily follows. A witness, although a party, may tell the truth and the whole truth; but a jury has the right to consider the question of self-interest in determining the credibility of a witness, and the degree of weight to be given to his testimony. Again you may consider the relation of the several witnesses to the parties concerned in the case. They may be connected with one or the other of the parties by ties of blood, or of friendship, or by other associations, and they may or may not be influenced by such associations. These are considerations which will naturally suggest themselves to you and which may aid you in estimating the value of some of the evidence in

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the case. You may find some witnesses corroborated and others contradicted; you may be guided to some extent in weighing the testimony of a witness by his or her attitude upon the witness stand and his or her manner of answering questions, or of evading questions; and you will in your consideration of the many phases of this case, decide whose testimony it is that bears the impress of truth and seems the most probable, reasonable, natural and consistent, when you view the evidence as a whole and when you recall to your minds all the circumstances disclosed in the testimony.

I have said enough to indicate to you some of the ways by which you may test the credibility of witnesses. You may think of some other ways. You have the right to draw from your experiences for guidance, remembering that you verdict must be based upon the truth as you find it from the evidence; in other words, upon the credible evidence in the case. If you believe some of the testimony to be false, unreasonable, unworthy of belief, fabricated, discard it, so that your final judgment may be based upon the foundation of evidence which you find to be true.

After deciding the true facts of the case it will be your duty to apply the law to the facts. The principles of law involved in this case are few and simple. The law governing wills and their execution is well settled. There is nothing intricate about it. Therefore, your minds will not be unduly burdened with legal instructions; but, the instructions, whatever they are, must be received by you from the court, as I have already stated.

I hardly need remind you that you are jurors and that your oaths require you to try this case according to the law and the evidence. You have no right to harbor or entertain any prejudice against any of the parties to the case. Keep your minds clear of all feeling and sentiment except that naturally and legitimately produced by the evidence itself.

In calling your attention to the evidence I shall first refer to the plaintiff's case as presented by him in chief. The will and codicil were offered in evidence and have been examined by you. They are typewritten on four sheets of paper, purporting to be the letterheads of the People's Coal Company. The will is in the form of a letter directed to

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Mr. G. B. Schooley, Philadelphia, Pa., the actual bequests being found on the third page. On the fourth page is found the codicil. The third and fourth pages bear the signature of J. L. Crawford as testator and the signatures of Bahman and Riedel, as witnesses. The first page bears the date, New York, Dec. 16, 1904; the third and fourth pages are dated January 30, 1905. The plaintiff testifies that the will and codicil were signed in his office on North Eleventh street on that day, after two o'clock in the afternoon, the exact minute not being given. The two subscribing witnesses, Bahman and Riedel, were sworn and their testimony is to the same effect. These two men at that time were strangers to each other and to Mr. Crawford. I shall not give the details of their testimony. They and the plaintiff describe with much particularity the circumstances immediately surrounding the execution of the will and codicil. You heard the examination in chief and the cross-examination of the three witnesses. Their testimony is very voluminous. Their narrations differ in minor matters; but substantially they agree in their testimony and the effect of their evidence is, each corroborating the other, that J. L. Crawford, while in Philadelphia on January 30, 1905, executed the will and codicil offered in evidence by the plaintiff, in the presence of the plaintiff and the two subscribing witnesses.

The defendants deny the allegations of the plaintiff. They say that no such will and codicil was executed by Mr. Crawford in Philadelphia on January 30, 1905, or at any other time, and that the testamentary papers offered in evidence by the plaintiff are forgeries and are the result of a conspiracy between the plaintiff and the witnesses Bahman and Riedel. The defendants go farther and say that the incidental papers called a will and codicil were typewritten for the plaintiff by Miss Ivey in Easton, Pennsylvania, on the afternoon of June 7, 1906, more than fifteen months after the death of Mr. Crawford.

I have given you briefly the main contentions on both sides of the case. The evidence discloses a mass of facts and circumstances which should be considered by you in determining the question whether or not the will and codicil produced by the plaintiff were executed by Mr. Crawford. The burden of proving this to your satisfaction is on the plaintiff. If he has failed to do so, then his case falls.

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I shall endeavor to analyze the evidence and to arrange and classify it in such a way as to assist you in your consideration of the case. I shall take up each branch of the evidence and shall briefly refer to the facts which are relevant to each particular phase of the case on both sides. In such an important case as the present one I deem it the duty of the court to charge the jury at some length. At the same time you must remember that you are the judges of the facts and of the credibility of the witnesses. It is you that must sift the evidence—compare, examine and judge the testimony of the witnesses. I shall not intrude upon your province, nor indicate to you my opinion as to the merits of the case. And I want to remind you also that it is your duty to consider *all* the evidence. There are many facts in the testimony that I may, and probably shall not refer to; but you are not confined to the matters mentioned by me, and my omission of any reference to certain facts does not withdraw these facts from your consideration. Yet, it is my duty to assist you by calling your attention, in orderly sequence, to the material and salient phases of the case, so that you may deliberate intelligently and thus arrive at a righteous verdict.

I shall begin the discussion of the evidence with the events of January 30, 1905, the date of the alleged execution of the Schooley will. It is an undoubted fact that Mr. Crawford was in Philadelphia on that day and that he was in the plaintiff's office on North Tleventh street day an dthat he was in the plaintiff's office on North Eleventh street in the afternoon of that day. Plaintiff says he expected him on that day because of the letter, a copy of the will, received by plaintiff the month before. Were Bahman and Riedel there on that same afternoon? And did the things happen about which they testify with such minuteness? It is clear that Bahman and Riedel were strangers to each other and to Mr. Crawford. How is it that both men met in the plaintiff's office on the afternoon of the same day and practically at the same hour? Was it a coinicidence? Bahman says he intended being there on that day because he had written a letter on the 25th of January stating that he would call on the plaintiff on the 30th; but the defendants claim that Riedel was not expected; and that the fact that the two men should meet at about the same hour without a previous understanding, and that Mr. Crawford happened to be there also about

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the same hour was to say the least an unusual occurence. It may have been a coincidence. Whatever it may have been it is a circumstance that you have the right to consider.

As to the question of Bahman and Riedel's presence in the plaintiff's office on January 30th, the testimony of the Misses Armbruster has been offered. These two ladies kept the house in which the plaintiff and Mr. Cavanaugh had rooms. According to this testimony no stranger, unless accompanied by one of the roomers, could enter the house without ringing the door bell and being admitted by one of the other of these two ladies. Miss Emily Armbruster testifies that she saw Mr. Crawford in the house when he was on his way to Florida a few weeks before he died. She let him into the house herself and ushered him into the room after which the plaintiff came downstairs. Mr. Crawford asked for Mr. Schooley. It was after dinner, about two o'clock. Mr. Crawford was there from half to three-quarters of an hour. He then left, the plaintiff taking him to the door. The visit of Mr. Crawford is impressed upon this witness' memory by the incident of the nose bleeding and the towel and the talk she had with Mr. Schooley the next day. Miss Armbruster is positive that during the visit in question of Mr. Crawford and Mr. Schooley that nobody else entered the house; that the two cousins were alone and that Bahman and Riedel were not there that afternoon. This evidence of course is important, because it is a direct contradiction of the evidence of the plaintiff and of that of Bahman and Riedel. Miss Armbruster is corroborated by Bahman and Riedel as to the manner of entering the house by ringing the doorbell and being admitted by a lady; and the incident of the nose bleeding is mentioned by Mr. Schooley. He thinks it happened on that day, January 30th. The other Miss Armbruster is sworn and corroborates her sister as to the way people entered the house, the visit of Mr. Crawford, the length of time he stayed there, his departure, the incident of the nose bleeding and the fact that no one else was there at that time. In this connection it is proper to refer to the testimony of Miss Emily Armbruster as to an interview that plaintiff had with her in the summer of 1906, about June. Mr. Schooley asked her if she remembered the last time Mr. Crawford was there, and she answered that it was the last time before he went to Florida,

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the day that his nose bled. Then Mr. Schooley asked: "Do you remember anyone else being there?" When she answered, "No," he asked her to tax her memory, and said: "If you can remember that I will make you a handsome present." This is denied by Mr. Schooley. If he said it, you may look upon his remark as an effort to have the witness change her recollection accompanied with a promise of reward. I have dwelt at some length on the testimony of these ladies because it relates to the time and occasion when, according to the testimony of the plaintiff and his two witnesses, the alleged will and codicil were executed. If you believe the testimony of these two ladies, particularly that of Miss Emily, Bahman and Riedel were not in the house on January 30th, and, therefore, that they did not see Mr. Crawford, and could not have witnessed the will as they testify. The evidence of these two ladies alone, if you believe it, might justify you in your own minds in deciding this case against the plaintiff.

The important and crucial part of the evidence of Bahman and Riedel relates to the alleged execution of the will and codicil by Mr. Crawford on January 30, 1905. Defendants claim that these two witnesses are unworthy of belief and they have offered evidence on that point. I shall refer to the evidence intended to affect the credibility of Bahman. When Mr. Cavanaugh was on the stand he testified to a visit made by Bahman to Mr. Schooley's office in the summer of 1906. Mr. Schooley was not in. During the visit Bahman, looking at the picture of Mr. Crawford, asked: "Who is that stern man up there?" Mr. Cavanaugh said: "Don't you know who that is?" Bahman answered, "No," and then asked: "Is that the rich relation of Mr. Schooley, the miner?" Cavanaugh said, "Yes; didn't you ever see him?" And Bahman answered, "No." Another incident related by Cavanaugh involves Bahman's acquaintance with Riedel. The incident occurred at the same visit. Cavanaugh was looking at some orders, among them Riedel's, when he said: "Riedel beats you." Bahman said he did not know Riedel and had never met him. If Cavanaugh's evidence as to those two incidents is true it reflects upon the credibility of Bahman and may cast a doubt upon his testimony in which he says that he met Crawford and Riedel on January 30, 1905, in the plaintiff's office. You must remember that Bahman denies the incidents related by Cavan-

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augh. You should consider this denial. If you believe Cavanaugh as to these matters consider carefully the effect of the testimony. If you do not believe him, then you may discard that part of his testimony.

I refer now to the evidence intended to affect Riedel's credibility. Had the plaintiff and Riedel ever met before they met in Landisville in March or April, 1905, a month or two after the death of Mr. Crawford? The plaintiff and Riedel testify that they had met the year before. Defendants refer to the evidence of Samuel Parks on this point. Parks kept a livery stable in Landisville, starting in business March 1, 1905. After he had been in business about a month Mr. Schooley came to Landisville claiming he was a stranger there. It seems, according to Parks' testimony, that Mr. Schooley was looking for an agent to sell his fertilizer. He offered the agency to Parks, but Parks did not want it and referred him to Charles Riedel. Mr. Schooley was sent over to Riedel's house, which was near by, but Riedel was not at home. Mr. Schooley waited to see or get acquainted with Riedel. The next morning Parks saw Riedel about the matter and asked him if he had done business with Mr. Schooley. Riedel said he was going to find out more about the fertilizing business before he took hold of it. Joseph Welden gives similar testimony to the effect that plaintiff was a stranger in Landisville and that he did not know Riedel. On this same question plaintiff produced four witnesses—I think it is four—the two Sicklers, Johnson and Sneethen, who testify that Mr. Schooley and Riedel were acquainted in October and November, 1904, that they were at Sickler's house and store, and that some, if not all of the witnesses talked with both of them. You notice here a contradiction. You should scrutinize carefully the evidence on both sides on this point. Are any of the witnesses mistaken as to the date—the year? Sometimes witnesses remember an event very vividly, but may be honestly mistaken as to dates. In such a case it is always important to find another event the date of which is certain and unquestioned, provided this other event has some relation in point of time to the event or events about which the witnesses are testifying. In order to determine the period when Riedel and the plaintiff first became acquainted is there any other circumstance that happened which has a fixed date and which enables the plaintiff and Riedel with the other four witnesses to remember that the two men

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became acquainted in the fall of 1904? Or is there such a circumstance and uncontrovertable date which enables Parks to fix the spring of 1905 as the time when the plaintiff and Riedel first became acquainted? If it be true that they did not become acquainted with each other until March or April, 1905, then they could not have met in the plaintiff's office on January 30, 1905. If they were known to each other the prior autumn, the testimony of Parks and Weldon is of no value. Again the integrity of Riedel's evidence is brought into question by the testimony of S. F. Bowen. Bowen and Riedel were walking together from Landisville to Manatola about September, 1906. They were on friendly terms, and in the course of their conversation Riedel was saying how he had got along and how he had started poor, but he thought that would not last forever, because he expected to get a large sum of money for the witnessing of a will. It appears already in the testimony that he had not witnessed any other will than that of Mr. Crawford. Riedel denies making any such remark to Bowen. If you believe he made the remark you have the right to take that into consideration in judging the credibility of Riedel as a witness. There is other testimony relating to Riedel, bearing upon his presence in Philadelphia on January 30, 1905. I refer to the evidence as to his buying a hat at Wannamaker's on January 30th, as well as to the evidence as to trains, train schedules, the shipping of produce by Riedel on the same day at a place outside of Philadelphia. I cannot go over it in details. They are all for your consideration.

MR. TORREY—I believe it was the witness and not Riedel that bought the hat, the witness Lecroix.

MR. PRICE—Riedel bought a pair of shoes, if I remember.

Mr. O'BRIEN—Lecroix was the person who purchased the hat.

THE COURT—That is correct; it was not Reidel that bought the hat; Lecroix was the man that bought the hat on the 30th of January. I have misunderstood the evidence.

In this connection I call to your attention a part of Mr. Hawley's testimony detailing his interview with the plaintiff on May 18, 1906. I only refer to one fact now, and I do that because of its relevancy to the breach of the evidence which I am now discussing. The plaintiff,

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according to Mr. Hawley's testimony, said that there was no witness to Mr. Crawford's will—that nobody saw him sign it, as far as plaintiff knew. Plaintiff denies this statement. If he made the statement, then it is in the line of the evidence given by the Misses Armbruster to the effect that Bahman and Riedel did not meet Mr. Crawford at plaintiff's office on January 30th, 1905.

You notice that up to this point I have ben discussing only the circumstances surrounding the visit of Mr. Crawford to North Eleventh street at the time it is alleged that the disputed will and codicil were executed. I have referred briefly to the evidence immediately relevant to that phase of the case, and, incidentally, I called your attention to the question of the credibility of Bahman and Riedel as witnesses. My final suggestion to you on this branch of the evidence is that if you are satisfied on consideration of all this evidence that Bahman and Riedel were not in plaintiff's office on January 30, 1905, and, therefore, did not witness Mr. Crawford's will as alleged, you need not consider the other evidence in the case. You could on that evidence alone, if you reach such a conclusion, find a verdict for the defendants.

I will now call your attention to the date of December 16, 1904. This date connects itself with the disputed will, because the first page bears that date. It is claimed by the plaintiff that Mr. Crawford was in New York city on December 16 and that he sent the copy of the will to him, the plaintiff, by mail, it being received on the 17th or 18th. According to the plaintiff's testimony the envelope with the postmark on it was destroyed at the request of Mr. Crawford. You must remember that the fact whether Mr. Crawford was in New York or in Scranton on that day is only one of the many circumstances in the case. The relevancy of the fact that he was in New York city is that he had the opportunity to mail a letter to the plaintiff, and that if he was in Scranton, that he did not have that opportunity. In itself the circumstance is a simple one and not a great significance. At the same time I know of no single circumstance in the case concerning which there is so much testimony. According to the evidence of several witnesses Mr. Crawford was in Noxen on December 15, 1904, and indicated his intention of going to New York. At Noxen, on that day, he bought a railroad ticket for Towanda. Another witness, Lewis H.

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Orcutt, testifies that he saw Mr. Crawford in New York city on the 16th and took lunch with him at the Manhattan hotel. Orcutt says he stayed at Smith and McNeill's hotel on the night of the 15th, and that he wrote his name on the hotel register, paying one dollar for his room. This witness is contradicted by the hotel register itself. His name does not appear upon it, if you believe the testimony taken Saturday in New York city. On the other side you have the testimony of many witnesses to the effect that Mr. Crawford was in Scranton on December 16th. The witnesses fix the date as the date of an inquest in which the People's Coal Co. was concerned. The inquest was held in this court house on the evening of December 16th. According to the evidence produced by the defendants Mr. Crawford consulted with his foreman, his fire boss and others, who are sworn, preparing for the inquest. And during the forenoon, between nine and ten o'clock, Mr. Crawford had a treatment with the osteapath, Dr. Downing. Are all these witnesses mistaken? Or is Orcutt mistaken as to the time he visited New York and met Mr. Crawford? Whatever view you may take of the circumstance of Mr. Crawford's presence in New York or in Scranton, the only bearing it has in this case is that if Mr. Crawford was in New York he had the opportunity to mail a letter to Mr. Schooley. It does not necessarily follow that he did mail a letter, or the letter which the plaintiff said he received. The evidence as to this circumstance is for your consideration. This is all I desire to say as to the date of December 16, 1904.

The next phase of the evidence to which I direct your attention relates to the characteristics of the disputed will itself. It is claimed by the defence that Mr. Crawford could not have made the peculiar mistakes to be found in the will. If the testimony is true as to Mr. Crawford's accurate knowledge of his business investments and holdings, and his great memory of figures connected with his affairs, it is difficult to understand how he could have made the mistakes appearing in the disputed will. This will bequeaths $200,000 of the stock of the People's Coal Company to the plaintiff. The capital stock of this company, according to the evidence, was $100,000. It never was any more. And Mr. Crawford held only $55,000. How then could he will away $200,000? In the will Mr. Crawford appears to state that

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by a vote of the board of directors the capital stock was raised to $275,000. Defendants claim that Mr. Crawford knew better and that he could not and would not make such a mistake. You find also under this will that the plaintiff is to receive $500,000 in stock of the Chicago Subway Company. Evidence has been received showing that Mr. Crawford's holdings in the Chicago Subway at any time did not exceed $175,000. Plaintiff's witnesses testify to declarations made by Mr. Crawford at Noxen a few months before his death to the effect that he had invested $500,000, or had that much interest in the Chicago Subway. You are to place your own construction upon these declarations, if they were made. You may conclude not to pay serious attention to declarations made by a man who is successful, when he visits the friends of his early youth in his native village or town. They are not declarations that Mr. Crawford was bound to make to anybody. At the same time you have a right to consider these declarations on the question on of the extent of Mr. Crawford's holdings in the Chicago Subway, or his idea of these holdings. The best evidence of his holdings undoubtedly are the books of the company; and it is claimed that Mr. Crawford knew exactly, when he is alleged to have made the disputed will, the amount of his holdings in the Chicago Subway. It is safe to say as a matter of common experience that when a man sits down to make his will and enumerates some of his possessions, he is apt to be careful and accurate when he specifies the amount of stock he owns or devises. If you are satisfied from the evidence that Mr. Crawford's holdings of Chicago Subway stock were $175,000 and that Mr. Crawford knew this on December 16, 1904, and on January 30, 1905, then you would have the right to conclude that the mistake of bequeathing half a million of the stock is an inconsistent act, an improbable act, and may be a circumstance taken with the other evidence to bring in question the genuineness and integrity of the disputed will and codicil.

Another peculiarity in the will, according to the contention of the defendant, involves a matter of expression, a peculiarity or idisyncrasy of language. One of the sentences in the disputed will has the expression "of which." It is in the clause where Mr. Crawford states that he has requested his wife on a certain happening to return three notes to

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the plaintiff "and the two life insurance policies 'of which' you gave me for security for the notes." It is claimed that the ungrammatical expression "of which" is to be found in the plaintiff's utterances and in some of his letters. Instances are given from the testimony of the plaintiff before Judge Sando wherein he uses the same expression, and it is also found in letters written by the plaintiff. This is a circumstance that you have a right to consider. Experience and reasoning teach us that persons may have habits of spelling and of expression, and the use of an habitual expression in a disputed document may be used as a circumstance with other evidence to establish the authenticity of a document or to prove it fraudulent. Two other mistakes are pointed out in the will, namely, the misnaming of Mr. Patterson, calling him Russell instead of Roswell, and mispelling the name of John Hayes. There is evidence to show that Patterson was the friend and attorney of Mr. Crawford and that Hayes was also very closely connected with him. It is claimed that these mistakes cast a doubt upon the authenticity of the disputed instrument.

I have mentioned some of the matters which the defense claims throw a doubt upon the plaintiff's case. The circumstances I have referred to are to be considered by you. Counsel have discussed other mistakes which are claimed to be found in the will. I need not refer to them further.

Another feature of the evidence in this case has reference to the relations existing between Mr. and Mrs. Crawford from the time of their marriage to the time of Mr. Crawford's death. On the part of the defense evidence has been given detailing the close and intimate relations between these two people. Mrs. Crawford, Mr. Shepherd, Miss Godshall, Mr. Simpson and others have testified on this point. In substance, their testimony is that Mr. and Mrs. Crawford began their married life in comparative poverty; that they both assisted in their early accumulation of property; that they were together a great deal at home and from home; that they consulted each other in all matters of importance and that Mr. Crawford would make no investments without consulting Mrs. Crawford; that he exhibited to her inventories from time to time showing his possessions and investments and that they seemed from the beginning to live a happy married life.

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Testimony of a similar nature has been given as to the cordial and confidential relations existing between Mr. Crawford and his step-son, Mr. Shepherd, they calling each other father and son and being connected together in industrial enterprises and other matters, and having homes next to each other, seeing each other very frequently and going on journeys together. The same affectionate feeling, if you believe the evidence, was entertained by Mr. Crawford towards his grand step-daughter, Florence, Mr. Crawford being anxious to adopt her. I have only very briefly referred to his phase of the evidence. It is for your consideration. Defendants claim that because of the pleasant relations mentioned, it would be unreasonable to believe that Mr. Crawford would secretly will away such a large portion of his estate to any othreperson that his wife or those persons directly connected with him. It is contended that such an act would be improbable and inconsistent with Mr. Crawford's conduct or acts during the whole of his married life. This is the argument made by the defense and it is proper for your consideration. There is no contradiction of the evidence as to the relations between the parties I have named.

In this place I will call your attention to the evidence of declarations on the part of Mr. Crawford indicating testamentary intentions. Palintiff has produced several witnesses who testify to declarations made by Mr. Crawford as to his testamentary intentions in favor of him, the plaintiff. Such evidence is admissable to confirm the provisions of a will corresponding with such declarations. Declarations of this character are found frequently in cases where mental incapacity or undue influence are the issues involved. They are more corroborative than substantive, as evidence. A man may make a declaration at one time that he intends making his will in a certain way; and in a day, or a month, or a year, make a will entirely another way. A testator, of sound mind, is the absolute master of his own testamentary acts. He is not bound by his declartions. He may change his mind as often as he pleases. Nevertheless, in a contest over a will, a party claiming under the will may offer testimony to show that the provisions of the will are consistent with the testator's prior declarations of his testamentary intentions. Declarations made at a remote period of time are of less value than those made at a time nearer to that of the execution of the

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will. In this case plaintiff claims that he has proven declarations by Mr. Crawford of testamentary intentions favorable to him, the plaintiff, and consistent with, at least some of the provisions of the disputed will. These declarations are testified to by the Misses Newberry, Mr. Cook, Mr. Miller, Mr. Reinhart and by other witnesses, and cover a period of time from the summer of 1903 to a few months before Mr. Crawford's death. Those witnesses testify that Mr. Crawford held his cousin, Mr. Schooley, in high regard; that Mr. Crawford stated that the plaintiff would be a very wealthy man when he, Crawford, died; that the plaintiff was to have a controlling interest in the People's Coal company; that he had loaned the plaintiff some money and would loan him more if necessary, and that he thought more of the plaintiff than of any other relative. I give only the substance of the declarations.

Remembering what I have stated to you that declartions of the character thus testified to are of a corroborative and not of a substantive nature as evidence, give them their proper place in your deliberations and judge them in the light of the law as I have laid it down to you.

Certain declarations of a similar character are testified to by some of defendants' witnesses. I refer to the testimony of Mr. Phillips and Mr. Evans, who met Mr. Crawford shortly before his last visit to Florida. Mr. Crawford apparently was apprehensive of death at that time. He did not expect to return alive from Florida. In a bantering way Mr. Phillips asked him to remember him in his will, saying that he would like to have the Oxford colliery. Mr. Crawford said, "No; I must leave that to Jim," meaning Mr. Shepherd, "to take care of for his mother." This is a declartaion inconsistent with one of the provisions of the disputed will.

I have said all that I intend to say about testamentary declarations. I submit them to you for your consideration.

Another phase of this case relates to the conduct of the plaintiff in view of the possession by him of a will bequeathing to him a large amount of property. The defense base an argument upon acts and conduct of the plaintiff subsequent to the death of Mr. Crawford, which are claimed to be inconsistent with the plaintiff's contention that

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he had the will of January 30, 1905, within his control. Such an argument is legitimate when based upon proper facts. It is a matter of common experience hat a man's acts sometimes belie his words. Where they are inconsistent one may be judged by the other, and the words may be disbelieved if the man's acts show them to be false. I shall state briefly some of the matters referred to by counsel. Mr. Crawford died February, 1905. The plaintiff, I believe, came to the funeral, and made a subsequent visit, one or more, to Mrs. Crawford. During none of these visits did he mention the will of January 30. Nor did he attempt to prove the will in the register's office or to take measures in that direction until sometime in 1906. It is claimed that a person having a will in his favor leaving him a large estate would be anxious to put it on record within a reasonable time so as to secure his rights and to control the property bequeathed to him. It is in evidence also that he requested Mrs. Crawford to surrender to him the notes, and subsequently he asked her to lend him $28,000 to invest in his business. This conduct is claimed to be inconsistent with the plaintiff's contention that he had the last will and testament of Mr. Crawford in his possession in which Mrs. Crawford was directed or requested to return to Mr. Schooley the three notes amounting to $11,000, and the question is asked why should the plaintiff ask as a favor that which he was entitled to as a matter of right. In this connection I call your attention to an explicit direction in the disputed will. After bequeathing $200,000 of the capital stock of the People's Coal company to the plaintiff Mr. Crawford directs that immediately after his death a special meeting of the directors should be called and the plaintiff elected director and president, at a salary in the shape of profit of $10,000 a month. Considering the very favorable provision for his benefit he took no means to call the directors together, or to inform the officers of the People's Coal Company of the change intended in the presidency of the corporation. According to plaintiff's testimony he did not bring the disputed will to Scranton until May, 1906, when about fifteen months has elapsed since Mr. Crawford's death. By this time, if the profits of the company warranted it, the plaintiff would have been entitled to $150,000 provided he had become director and president in accordance with the suggestion of the will. Considering the evidence of plaintiff's financial

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condition in 1905 and 1906, it is claimed that his failure to take the necessary measures to secure his rights and to obtain the large sum of money bequeathed to him, reflects discredit on his contention that he had in his possession such a will as he has offered in evidence in this case. Along the same line are the letters written by plaintiff to the Scott Fertilizer Company; his expression of disappointment to Mr. Cavanaugh when he learned the terms of Mr. Crawford's will and found that the $11,000 in notes were not canceled and that Mr. Crawford had not left him, the plaintiff, something else. Neither did the plaintiff mention the new will to Mr. Cavanaugh notwithstanding their close association until the summer of 1906. Other acts of the plaintiff are referred to in the evidence and by counsel. The matters I have just discussed are for your consideration. You have the right to consider all of plaintiff's acts, his conduct as disclosed by the evidence, whether in his favor or against him, as bearing to a more or less extent upon the integrity of plaintiff's contention in this case.

You notice, gentlemen of the jury, that I have not yet said anything about the alleged typewriting of the disputed will, at Easton, Pennsylvania, by Miss Ivey, nor as to the expert testimony, nor as to the many other facts relevant to the alleged fabrication of the will. I have studiously refrained from doing so up to this point. I have already classified the other evidence in the case. I began with the date of January 30, 1905, when the will in dispute is alleged to have been executed. Then I discussed the evidence connecting itself with the events of December 16, 1904. I next referred to the will itself and to the mistakes and errors contained in it, which it is claimed could not have been made by Mr. Crawford. I afterwards discussed the relations of Mr. Crawford with his wife and his stepson, his declarations regarding his testamentary intentions towards his immediate family as well as towards the plaintiff and the effect to be given to such declarations, and then finally I discussed the claim of the defence as to the conduct of the plaintiff inconsistent with his contention in this case.

Without going any further and without considering the evidence as to the alleged forgery of the will, including the evidence as to the rubber stamps and the evidence of the experts—without considering this evidence, it is possible for this jury to dispose of this case and to

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find a verdict on the evidence I have already discussed. Nevertheless, it is my duty to call your attention to all the evidence in the case.

Defendants claim that the will and codicil produced by the plaintiff are fabricated and were typewritten in Easton, Pennsylvania, on the afternoon of June 7, 1906, by Miss Ivey. If this be true, then this one fact alone destroys plaintiff's case. You heard Miss Ivey testity and had an opportunity to watch her conduct on the stand. Did her evidence and her manner of testifying impress you with her truthfulness? She described to you the manner in which the will and codicil were produced and the length of time it took her to do the work. She testifies that the plaintiff introduced himself to her as James L. Crawford from Scranton; that he produced four sheets of the People's Coal Company letterheads; that she made two copies of the papers and that he paid her five dollars for the work. She was cautioned that the work was confidential and that if she found any scraps of paper left belonging to the work, she was to destroy them. Miss Ivey identifies the will and codicil offered in evidence as her handiwork done on June 7, 1906, and she identifies the plaintiff as the man who furnished the copy and paid her the money. She says he was in her office about three and a half hours. She fixes the date as June 7th because she was delayed an hour and was anxious to attend a commencecent on the evening of the same day. She mentioned the five dollar bill the same evening to a young lady who was going to the commencement and also mentioned the fact that she had just made a man's will. Miss Ivey has no hesitation in saying that the plaintiff is the man who said he was James L. Crawford and who asked her to write the disputed will and codicil. Besides identifying the plaintiff Miss Ivey identifies the work she did. She mentions certains peculiarities in some of the capital letters and she remembers the mistake in the spelling of the word "formerly." I have referred to Miss Ivey's testimony at some length on account of its great importance. If you believe Miss Ivey, then, without reference to any other evidence in the case, you would be justified in finding a verdict for the defendants. Miss Ivey is corroborated by other evidence. Mr. Daubt, the janitor of the building in Taston, and Mr. Weller, the employer of Miss Ivey, identify the plaintiff. And you have also the evidence of the typewriting machine ieself on which it is claimed the dis-

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puted will was written. The machine has been operated in your presence, and according to the testimony of Mr. Osborne and Mr. Kupetz, it is the actual machine on which the disputed will and codicil were written. This is the conclusion they reach after an examination of the work of the machine. These experts have explained to you at great length the reasons for their conclusion, the main reason being that the defects in the type of the machine are exactly reproduced in the will and codicil offered in evidence as well as in other work produced on the same machine. You can consider the testimony of the experts alone; or you may consider the testimony of Miss Ivey alone; each, if believed, points to the same conclusion; together, if believed, they more strongly lead to the same conclusion.

The plaintiff denies the testimony of Miss Ivey and denies being in Easton on June 7th. He produces witnesses who testify that he was at Atlantic City for some days prior and subsequent to June 7th. These witnesses are three or four in number, and a receipt for board is produced. You heard them testify as to a wedding on May 23rd and a birthday on June 8th, and as to the plaintiff being afflicted with sore eyes during the period covered by June 7th. This is testimony for you to consider in connection with the testimony of Miss Ivey and the other witnesses who say they saw the plaintiff in Easton on June 7th. It is argued by counsel for the defence that these witnesses may be telling the truth, and yet that it would be an easy matter for the plaintiff to be at Easton on June 7th. When you can harmonize apparently contradictory testimony it is your duty to do so; when you cannot, you must decide whom you will believe.

In addition to the testimony as to the events of June 7th, defendants contend that they have proven such preparation and the procurement of such means on the part of the plaintiff as would enable him to consummate the fabrication of the will and codicil produced by him. They first show an effort by him to have printed letterheads similar to the letterheads in use by the People's Coal Company, and evidence is offered to show that the letterheads used for the will and codicil were never in use by the People's Coal Company. Several exhibits have been offered showing the difference, and you will find them in the Exhibit Book. Again, it is claimed that the plaintiff bought three fac-

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simile autograph rubber stamps, one of his own name, G. B. Schooley, and two of the name of J. L. Crawford. The books and orders of the Keating Company are produced showing the dates of the transactions, made in the regular course of business. The Schooley rubber stamp was ordered April 5, 1906, and delivered April 7th. The first J. L. Crawford stamp was ordered April 30th and delivered on the same day, and the second Crawford stamp was ordered on 1st and delivered May 11th. It was on this or the next day it is claimed that the plaintiff paid fifty dollars to Betelle for surrendering all evidence of the making the J. L. Crawford stamp. The fifty dollars was paid by Betelle to Smith, who is the Keating Company. The plaintiff is positively identified by Betelle and Smith. Betelle saw him three times and Smith remembers him because he had a long talk with him in which was explained the method of manufacturing rubber stamps. The plaintiff denies the rubber stamp transactions. He denies buying a stamp for himself and denies buying the Crawford stamps. He says he was not in Philadelphia when the orders were given, and he produces four witnesses who testify to his whereabouts at the time. They say he was at Woodmont, fifteen or seventeen miles from Philadelphia. Two of these witnesses the father and Randolph, are more particular as to dates than Kimball and Walter Mason, although they all agree substantially in their testimony. By this testimony the plaintiff is shown to be at Woodmont the first week in April, in the Mason house, and again in the same place from the last Saturday in April to the third of May. The purpose of this evidence is to show the plaintiff away from Philadelphia during the dates of the rubber stamp transactions, namely, April 5th, April 30th and May 1st. You have probably noticed that these dates do not cover May 11th, when the last Crawford stamp is alleged to have been delivered and when the fifty dollar transaction is said to have accurred. You have the right to consider the proximity of Woodmont to Philadelphia, and you have the right to harmonize the evidence on this point as far as you can possibly do so. Failing to do this you must choose whom you believe.

Counsel for the defense have called your attention to other circumstances, indicating, as they claim, other preparations on the part of the plaintiff looking towards the final production of the will and codicil.

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They, the counsel, refer to the interview with Stanley Schooley and to the plaintiff's efforts to ascertain the holdings of Mr. Crawford in the Chicago Subway, the purchase of four shares of stock, and the inquiries made by the plaintiff along that line. These circumstances have been fully detailed in the evidence and have been discussed at length by counsel.

It is your duty to consider the arguments made by counsel on both sides when they are sustained by credible evidence. If it be true that the plaintiff representing himself as J. L. Crawford purchased a stamp of Mr. Crawford's signature in May, 1906, it is a significant circumstance, especially when you couple the circumstance with the testimony of the experts that the signatures of Mr. Crawford to the disputed will and codicil were not written by a pen but were produced by some mechanical process.

There are a few other matters which I have not referred to. One of them relates to the testimony of John G. Hayes. Evidence has been received tending to show unusual interest and activity on the part of Mr. Hayes. He admitted upon the stand that he was active and enthusastic for the defense in this case. Whatever you find in the evidence reflecting unfavorably upon the conduct of Mr. Hayes, if you do find anything of that kind, you have the right to consider it in judging the credibility of Mr. Hayes as a witness.

It is claimed also upon the part of the plaintiff that he showed the disputed will and codicil to several persons previous to June 7, 1906. It was shown to Mr. Roberts and to the Mason family, four in number. If the will and codicil were shown to these people as they testify and if the papers shown to them were the identical papers produced here in court, then that evidence bears directly upon the evidence of Miss Ivey and is for your consideration. Plaintiff says he showed the will and codicil to Mr. Hawley on the 18th of May, 1906. This is denied by Mr. Hawley, who gives the interview at length. Mr. Hawley could not have given evidence as to that interview had not the plaintiff himself first given his testimony as to the same matter. The question of the conduct of Mr. Hawley as counsel is not before you except as it is connected with his testimony and arising from his testimony. Mr. Hawley says that the plaintiff did not show him the will and codicil; that he had

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left it with a safe deposit company and that there was no witness to it.

MR. PRICE—If your honor please, there is one fact that you omitted to state. There is also proof that Mr. Schooley was in Atlantic City from the 10th to the 14th of May. I think your honor inadvertently omitted that. He was out of Philadelphia on the 11th and 12th.

THE COURT—Counsel reminds me that I should have referred to the testimony placing Mr. Schooley at Atlantic City at the period that I have already referred to which would cover May 11th and 12th, 1906. You have the right to consider that testimony on the question whether he was in Philadelphia on May 11th and 12th when the transactions are alleged to have taken place as I have already detailed them to you.

There are a few other matters that I desire to refer to. The first is in relation to the tearing of the codicil. You noticed when the codicil was produced here in court that it was torn and that a part of the signature was under one of the parts or the lines of the tear. Explanation has been given to you by the plaintiff how this happened. A jury and a court will conclude that the tearing of an important document like a deed or a will or a codicil, is, to say the least, a very unfortunate occurrence if it is to be used in evidence in a court of justice. The plaintiff has offered evidence to show how this tear occurred, and he says that it got into Mr. Cavanaugh's hands, and that accidentally Mr. Cavanaugh tore it and threw it into the waste basket, where it was afterwards found and patched together in the manner in which it has been produced here. That is a natural explanation if true. Mr. Cavanaugh denies it; he says it is untrue, he did not have it and he did not tear it. But it comes here produced by the plaintiff, and it is incumbent upon the plaintiff to satisfy you how the partial destruction of this codicil occurred. It is claimed by the defense that it was done for a purpose, so as to prevent the effect of the testimony of experts in regard to the superimposition of one signature over another. You can examine the tear; whether it is apparently made for a purpose or whether it is apparently a tear that is made accidentally. It will go out with you; it is a part of the exhibits in the case, and it is for your consideration. Pay no attention to it if you believe it was accidentally done by Cavanaugh; but if you believe that it bears evidences of having

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ben done so as to prevent the possibility of superimposing one signature over another, then it is for your consideration.

Another matter I desire to call your attention to is the expert testimony in the case. I do not propose to discuss this at any length. Expert testimony is proper on a proper subject matter and in a proper case. The act of assembly passed by the legislature of Pennsylvania makes it proper and says in what cases and for what purpose evidence of this kind may be introduced. This act was passed in 1895, and I will read only a portion of it to you. "Where there is a question as to any simulated or altered document or writing, the opinions of the following persons shall be deemed to be relevant; First, the opinion of any person acquainted with the handwriting of the supposed writer. Second, the opinion of those who have had special experience with or who have pursued special studies relating to documents, handwriting and alterations thereof who are herein called experts. Third, it shall be competent for experts in giving their testimony, under the provisions of this act, to make comparison of documents and comparison of disputed handwriting with any documents or writing admitted to be the evidence of such experts respecting the same shall be submitted to the jury as evidence of the genuineness or otherwise of the writing in dispute. It shall be competent for experts in formulating their opinions to the court and jury to place the genuine and disputed signatures or writings in juxaposition, and to draw the attention of the jury thereto; and it shall furthermore be competent for counsel to require of an expert a statement of the principles on which he has based his work, the details of his work, and his opinion that the results are important to the point at issue, or the reasoning, analysis and investigation by which he has arrived at his opinion. The opinions of the witnesses to handwriting being submitted as competent testimony to the jury, the final determination as to whether any particular handwriting is genuine or simulated shall remain, as heretofore, a question for the jury on all the evidence submitted."

I might charge you for a half an hour as to the quality of expert testimony, as to the force and effect that a jury should give to it, but the act of assembly that I have read is the best description that I can give you of the nature of expert testimony, of its place in evidence

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given in a court of justice and of its value in the jury box. You see that the act of assembly is careful to explain that after you have heard all the experts, after they have analyzed the evidence before them, whether it be a typewriter, but particularly in this case as to the handwriting, that the final question rests with the jury; it is for you, gentlemen of the jury, aided by the testimony of these experts, aided by all the evidence in the case, it is for you to determine as to the genuineness of J. L. Crawford's signature to the will and codicil produced in evidence by the plaintiff in this case. You may do it without the aid of experts; you may throw out all the testimony of the experts, if you wish to do so, but you should not. It is for your consideration. The law makes it competent testimony, proper testimony for your consideration. So much has been said on both sides in regard to expert testimony that I thought I would read the act of assembly which gives it a place and a standing in cases particularly of this nature.

In connection with that let me call your attention to the character of the expert testimony in this case. I will not go over their names—cashiers, bank tellers, probably eight or ten, more or less, living here in Scranton and around Scranton, went upon the witness stand, and after examining the signatures to the disputed will and codicil they give it as their opinion that they were not the genuine signatures of Mr. Crawford. The main reason—and all the experts agree on that one point—is because they were so much alike; they were too much alike to be genuine signatures; one could be superimposed upon the other, and that no man writes his name twice in exactly the same space, with letters of the same height, with the spaces exactly the same between the letters, beginning each letter at the same point, ending each letter at the same point, beginning the signature at the same point and ending the signature at the same point. Then I need not discuss the evidence of the three experts. You heard them. You have the exhibits before you. The experts themselves gave the reasons for their conclusions with a good deal more care and possibly more ability than the counsel in this case or even the court could give them. They were on the stand for a long time, and you heard them with a great deal of patience and apparently with a great deal of care. Their testimony is for you. The three professional experts have come to the same conclusion, and they give

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their reasons therefor with the other experts, the bank cashiers and tellers that were put upon the stand.

Then there is another matter referred to, and that is the question of circumstantial evidence. All evidence is proper in a court of justice, whether it be direct or whether it be circumstantial. Sometimes direct evidence is more satisfactory than circumstantial. Again, in other cases, sometimes circumstantial evidence is more satisfactory than direct evidence. Direct evidence generally depends upon the testimony of a witness; the witness may forget, the witness may perjure himself, but when you have a series of circumstances consisting of facts it is possible in many cases that circumstantial evidence is stronger than direct evidence. Now this is a case that gives you both kinds of evidence. There is direct evidence as to the execution of the alleged will and codicil on January 30, 1905, and there is direct evidence that this will then come all the other circumstances that have occupied so much of our time; they may be considered as circumstantial evidence.

I probably have spent more time than I should in the discussion of this evidence with you, but I have come now to the conclusion. I endeavored in my charge to go over with you the whole case and to deal with it as fairly as I could, considering the mass of evidence on both sides. I hope you will have no difficulty in coming to an agreement, and I hope you will not have to stay out very long. Discuss the case carefully and reach a verdict that will be in accordance with the evidence and with the legal instructions that I have given you. The case is now in your hands. The form of your verdict will be: We find for the plaintiff, or we find for the defendants, and I will send out with you also the one question which is to be answered in addition to finding for the plaintiff or for the defendants.

The reading by plaintiff and his wife of a libelous letter concerning plaintiff and addressed to his wife is held, in Kramer v. Perkins, 102 Minn. 455, 113 N. W. 1062, 15 L.R.A.(N.S.) 1141, to constitute a publication thereof.

The lien of one advancing money to a lessee on the security of a building removable by him before the expiration of the term is held, in Hughes v. Kershow (Colo.) 93 Pac. 1116, 15 L.R.A.(N.S.) 723, to become ineffective upon the expiration of the lease.

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In the Court of Common Pleas of Lackawanna County.

No. 1719, September Term, 1907.

Petition to Amend.

Sarah McHale vs. The Pine Brook Colliery Accidental Fund.

It is error to style a widow an administratrix" in an action to recover death benefits due the family of her deceased husband. The court will, in such case, permit an amendment by striking out the word "administratrix."

Mr. John F. Murphy, for plaintiff.

Mr. L. P. Wedeman, for defendant.

Opinion by Carpenter, A. L. J., November, 1908.

It appears by the petition and affidavit of Sarah McHale that this action was brought before an alderman to recover "death benefits due to the family of Anthony McHale," deceased. The petition sets forth that by mistake the suit was instituted in the name of Sarah McHale, administratrix of the said Anthony McHale, deceased, when it should have been in the names of the said Sarah McHale, widow, and John McHale, Margaret McHale, Bridget McHale, Mary McHale, Elizabeth McHale and Anthony McHale, children of the said deceased, and we are asked to amend the record by striking out the word "adminstratrix" and adding the names of the several children.

Amendments sicilar in principle tothis have been frequently allowed. Sarah McHale, who sued as administratrix, is the widow of Anthony McHale, deceased, and the mistake was in styling her administratrix; and that was cleary amendable. The children who ask to join as plaintiffs are not strangers to the claim, but joint heirs of the deceased, and all claim through the same source. See Jamieson vs. Capron, 95 Pa. St., 15.

The amendment of the name of the party plaintiff is allowed as prayed for. If the plaintiffs wish to enlarge their claim from one hundred to one hundred and fifty dollars, let them file a statement accordingly.

Failure to provide a special fund out of which town warrants are payable is held, in Howe v. Gunnison (Colo.) 95 Pac. 283, 15 L.R.A. (N.S.) 1276, not to prevent the running of the statute of limitations if the town officials denied the validity of the warrants and refused to provide the fund for that reason.

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In the Orphans' Court of Lackawanna County.

No. 533. *Year* 1906.

Appeal from Register.

In Re: Estate of Adam Thompson, Deceased.

An appeal to the Orphans' Court is the proper procedure when a will has been probated and it is desired to attack it.

While old age does not of itself incapacitate the testator from making a valid will, yet such a state of mind as amounts to senile dementia does incapacitate one from making a will.

On appeal from the register, the Court may, in a proper case and without granting an issue, set aside the admission of a will to probate and revoke letters testamentary.

Hon. John P. Kelly, for appellants.

Mr. Clarence Balentine, for respondent.

Opinion by Sando, P. J., June 29, 1908.

The decedent died October 1st, 1906, in the City of Scranton, leaving to survive him as next of kin, George B. Thompson, a son, Mrs. Franc T. Vail, a daughter, and George E. Pryor, a grandson, who is the sole heir of Martha A. Pryor, a deceased daughter.

By a certain testamentary paper, dated August 18th, 1906, when the decedent was about eighty-five years of age, purporting to be his last will and testament, probated on October 9th, 1906, W. M. Curry, Esq., was named as executor and trustee, and all the decedent's estate, real, personal and mixed was devised to W. M. Curry, Esq., to be held by him for a certain length of time, for certain uses, purposes and trusts.

The executor duly qualified and proceeded in the administration of the estate and as executor and trustee under the paper probated, took possession of all the property of the dcedent, real, personal and mixed.

On April 10th, 1908, George B. Thompson, Mrs. Franc T. Vail and George E. Pryor, by his attorney-in-fact, C. E. Pryor, took an appeal from the decision of the register in admitting to probate the testamentary paper. It is alleged as ground for the appeal that on August 18th, 1906, the decedent was of unsound mind, and did not possess testamentary capacity to make a valid will.

The decedent's estate, worth approximately, as alleged in the petition to sustain the appeal, the sum of one hundred thousand dollars,

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which under the intestate laws would have descended to the petitioners; but under the provisions of the paper probated George B. Thompson and Mrs. Franc T. Vail receive the income from the estate, share and share alike, during their lives only, and George E. Pryor receives no estate whatever until after the death of George B. Thompson, at which time he will receive one-eighth of the corpus of the estate, providing the death of George B. Thompson shall not occur before the year 1926, but if George B. Thompson shall die before that date, then he shall only receive one-eighth of the income of the estate until the year 1926 shall arrive, at which time he will receive one-eighth of the corpus thereof.

An appeal to the Orphans' Court is the proper remedy when a will has already been probated and it is desired to attack it: Mathews vs. Biddell, 8 Pa. Super. Ct. 112. Judge Smith, speaking for the Court, observes (p. 114): "With the probate of the will the register's judicial powers ceased. Under the Constitution all questions thereafter touching the probate of the validity of the will are to be determined by the orphans' court, on appeal from the register's decision * * * * ."

All the parties named in the will have been warned by citation, and are thus before the court, but none appear with the executor as proponent; no answer was filed to the petition to sustain the appeal; and at the hearing the executor filed his formal disclaimer. No issue is demanded. The case is thus before us.

The subscribing witnesses were called to prove the execution of the paper. The testimony of the subscribing witnesses is, of course, entitled to great respect. In the absence of countervailing proof, it is decisive, but the Court should not hinge the cause upon their testimony, if there are other material facts and circumstances, and opinions of other witnesses in evidence, bearing upon the testator's capacity.

Upon examination of the evidence we find in the testimony of Dr. H. L. Vail, grandson of decedent, and a practicing physician since 1903, that in 1905 and 1906, he had his office in a building belonging to decedent; that during the last four years of decedent's life he saw him frequently, sometimes three or four times a day; noticed a great change

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in decedent in 1905, at the time of the erection of the building in which he had his office; decedent lost his memory; would say unnecessary things; would sit for an hour and a half at a time and tell the same story over a nd over again; would tell things to strangers about his people that were not true; that in June, July and August of 1906, the decedent's physical condition was very poor; suffering from ailments common to men of his age; mental condition at the time very bad, would characterize it as general senility; decedent was suffering from progessive dotage; he had not sufficient intelligence to perform any business transaction requiring any mental effort; after giving the decedent his check for four months rent in advance, decedent appeared within ten days of the first of the following month and asked again for his rent; decedent again appeared on the first of the following month for his rent; decedent's memory for recent events had almost failed; that he lived mostly in the past; that he could remember things happening forty or fifty years ago, but could not remember ten days back; and that he did not think the decedent capable in August 18th, 1906, taking into consideration his physical and metal condition, of comprehending a business transaction or making a valid will.

Dr. Mary Shepherd when called testified as follows, viz: Am regularly graduated physician; practiced medicine for many years; had offices in decedent's building for eleven years; was there in the Spring and Summer of 1906; decedent's rooms were just across the hall; first noticed failing mentality the last six months of decedent's life; he was weak and childish; in his dotage and irritable; was in the condition "when one talks about and turns against his own without apparent cause;" saw him right up to the time of his death; and on August 18th, 1906, the decedent was in no condition to comprehend the nature of a business transaction, such as making a will.

General practitioners of medicine may give opinion as to mental condition of a testator, whether based on hypothetical statements of facts or on an attendance and acquaintance with the deceased: Pidock vs. Potter, 68 Pa., 342.

The competency of George Martin, M. J. Burns and L. J. Williams, disinterested witnesses, was disclosed by the witnesses themselves. They were friends and acquaintances of the decednt and had known him from

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thirty-five to forty years. They were in a position to hear him talk, observe his actions and conduct, and to note any change in him. Before expressing an opinion as to his mental capacity, they qualified themselves by stating facts upon which it was based. When it appears that a witness has had friendly and business intercourse with the decedent very frequently, so that his opportunities for judging the condition of the mind of the decedent were good, then his opinion would be entitled to weight, in judging the mental capacity of the decedent. These witnesses were of the opinion that the decedent was in his dotage in the Summer of 1906; that he had lost his memory, and was physically and mentally weak, and in his weakened condition not fit to make a will.

Lay witnesses may give opinions as to testamentary capacity, after first giving facts of their own knowledge tending to show want of capacity: Dickinson vs. Dickinson, 61 Pa., 401; Pidock vs. Potter, 68 Pa., 342.

The impressions the mental condition made upon George B. Thompson, Mrs. Franc T. Vail and C. E. Pryor, who were well acquainted with the habits and character of the decedent, and who had occasion to test the vigor of his faculties, allowing for the possible bias of personal interest, are to be regarded as trust worthy and of much consequence.

As the paper is contested on the ground of want of capacity in the decedent to make a will, by reason of the unsoundness of mind caused by senility, we may as well refer to some of the authorities. On the subject of senile dementia, this language is used in 1 Redfield on Wills, *94: "There is probably no form of mental unsoundness which has been considered so often, in connection with testamentary cases, or which has so important a bearing upon, or the thorough comprehension of which is so much to be desired, as an aid towards the correct understanding of, such cases, as that of the imbecility of old age, or senile dementia."

One of the first symptoms (if not invariably the first) of the approach of imbecility from age, is the loss of memory. Hence, it becomes essential that each testator's situation, circumstances, habits, life, and his relations to those who surround him, must be thoroughly investigated before either court or jury can have adequate conception of

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his ability to make a valid testament, and that whether fifty or eighty, or older: 1, Jarman, (5th ed.) 93.

According to the common, ordinary definition of a "sound mind," it must be perfect, healthy and not defective or impaired by age, sickness or other cause: Williams (Pa.) 16.

Testamentary capacity being a question of fact, many of the cases turn upon the sufficiency of the evidence, involving many minute details disproportioned in value of space required to report them: Beech, 188.

The rule of testamentary capacity in Pennsylvania was carefully expressed in an opinion by Mr. Justice Trunkly in Wilson vs. Mitchell 101 Pa., 495, in which he said: "To sum up the whole in the most simple and intelligent form—were his mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged at the time when he executed the * * * *. Neither age, nor sickness, nor extreme distress or debility of body will affect the capacity to make a will, if sufficient intelligence remains."

While extreme old age with its attendant physical and intellectual weakness does not of itself incapacitate the testator from making a valid will, yet such a state of mind as amounts to senile dementia does incapacitate one from making a will: 25 Am. & Eng. Ency. of Law (1st ed.) 995.

Upon an appeal to the Orphans' Court from the probate of a will the Orphans' Court has jurisdiction and power to determine the questions of fact involved and reverse the Register's decree. The appellants are not required to demand an issue, and if no issue is demanded the Orphans' Court determines the question involved: Bearmer's Appeal, 126 Pa. 77.

On appeal from the Register, the court may, in a proper case and without granting an issue, set aside the admission of the will to probate and revoke letters testamentary: Thompson's Will, 13 Phila. 403.

And now, to wit, June 29th, 1908, this cause came on to be heard upon petition and appeal from the probate of alleged will of decedent and testimony taken; and upon consideration thereof, it is ordered, adjudged and decreed that the appeal be sustained, the admission to probate of said alleged will and testament by the register vacated and set aside, and the letters testamentary thereon revoked.

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In the Court of Quarter Sessions of Lackawanna County.

No. 768, October Sessions, 1908.

Appeal From Judgment of W. S. Millar, Police Magistrate.

City of Scranton vs. A. E. Rogers.

Among the corporate powers given to a city of the second class is the power for general revenue purposes, to levy upon pawnbrokers and to collect license taxes or fees to be fixed by ordinance. Therefore, a contention that in authorizing summary proceedings of a criminal nature with punishment by fine and alternative imprisonment overlooks the provisions of the Act of 7th March, 1901, P. L. 20.

Opinion by Newcomb, A. L. J., December 7, 1908.

Mr. D. J. Davis, City Solicitor, for plaintiff.

Mr. John F. Scragg, for defendant.

This is one of five several appeals from judgments of conviction in summary proceedings to enforce a penalty prescribed by an ordinance of the city of Scranton. It was agreed at bar that the cases should be heard on the evidence sent up by the magistrate as part of his transcript. The defendant in each case was charged, on the information of the superintendent of police, with carrying on the business of a pawn broker in the city without having procured a license therefore as required by ordinance known as File of Select Council 1903, No. 47, as amended by ordinance of 1906, known as File of Common Council, No. 34 of that year. The time of the alleged offense is July, this year. The date of approval of neither ordinance appears, but the case was argued on the assumption that they were fully enacted before the alleged offense occurred.

Section 1 of the first ordinance provides "that no person shall use, exercise or carry on the business of pawn broker within the city of Scranton without having first obtained a license from the Department of Public Safety, as hereinafter provided." The further provisions cover the amount of the annual fee to be paid for such license, the method of procuring it, and a variety of regulations under which the business of pawn brokers may be carried on. Section 12 imposed upon the unlicensed business a penalty of $200 to be collected as debts of like amount. This was amended by the later ordinance of 1906, which provides that "any person who shall engage in the trade, business or occupation of pawn broker without taking out a license or licenses as

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aforesaid . . . shall on conviction thereof be liable to a fine or penalty to be recovered by summary proceedings before the mayor or any police magistrate of the city of Scranton, and on default in the payment of such fine the person so convicted shall be committed to the county jail of Lackawanna county for a period not exceeding thirty days."

Defendant having been found guilty as charged, the magistrate passed sentence as follows: "And I, therefore, fine the said defendant and adjudge that he hath forfeited the sum of $100 and cost of suit, $7.26, and in default of payment thereof that he be committed to the Lackawanna County jail for thirty days."

It is thus apparent that the proceedings were in conformity with the terms of the ordinance as amended. If that be valid and the evidence sufficient to warrant defendant's conviction the judgment cannot be disturbed.

The facts adduced against the accused are not in controversy. He denies, however, that they show a pawn broking business. Aside from that he contends that the authority of the city in the premises is limited to the imposition of a penalty to be collected by civil proceedings only, as provided in the earlier ordinance, and that the attempt to subject the offense to summary punishment by fine and, in default of payment, imprisonment is in excess of the city's powers.

As to the merits it is conceded that the defendant has had no license since May 1st this year. It is admitted that he did have a license up to that date and under it carried on the business of a pawn broker. His denial as to the character of his business since that date is based on the form of contract under which he claims to buy and sell secondhand watches, etc. He uses a printed form of which he has a package bound in a book. It consists of a coupon and stub. This being filled out to show the identity of the article, the price, terms, etc., the coupon is signed by him, detached from the stub and delivered to the customer who has offered the article in pawn. The stub is signed by the customer and retained by defendant. This purports to show a sale by the customer. The coupon also recites the sale, and couples with that an option to the customer to repurchase the goods at the same price mentioned in the stub at any time within thirty days. It is also stated in the coupon that "this option embodies the whole agreement and under-

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standing of the parties hereto, and that no other or different understanding or agreement exists between said parties." The uncontradicted evidence, however, shows that the price mentioned in the papers is in excess of the amount actually received by the customer.

The conclusion is irresistible that this is a mere device to evade the law by giving to a pawn broking transaction the false color of a sale.

With the technical relations of the parties to this instrument as defined by its terms we have nothing to do. Neither the state, nor the city within the scope of its functions as the agent of the state for purposes of local government, is bound by any formula that may be adopted by defendant for the conduct of his business. Indeed, as regards any third party intended to be affected by the transaction of others the court will look through the mere form of contract in order to discover its true character. Especially is this so where the apparent effect of the writing is to give the business of its beneficiary immunity from proper taxation or municipal control. This branch of the defense merits little consideration and may be dismissed without further comment.

The other contention that in authorizing summary proceedings of a criminal nature with punishment by fine and alternative imprisonment, the ordinance of 1906, is *ultra vires*, overlooks certain provisions of the act of 7th March, 1901, P. L. 20, forming the present charter of cities of the second class to which Scranton belongs.

Among the corporate powers therein given to the city is the power, for general revenue purposes, to levy upon pawn brokers and collect license taxes of fees to be fixed by ordinance.

Act 1901, *supra*, sec. 3, Par. XXII, P. L. 42.

Paragraph XLIII of the same section, P. L. 46, authorizes the city "enforce all ordinances by inflicting penalties upon inhabitants or other persons for the violation thereof, not exceeding one hundred dollars for any offense, recoverable with costs, together with judgment of imprisonment, not exceeding thirty days, if the amount of said judgment and costs shall not be paid."

Hence in enacting the ordinance of 1906 the city was in the exercise of its express power and the contention to the contrary cannot be supported.

This disposes of the only questions raised by the appellant and the judgment of the magistrate is affirmed.

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In the Court of Common Pleas of Lackawanna County.

No. 165, September Term, 1906.

Rule for a New Trial and Rule for Judgment Non Obstante Veredicto.

Peter Peidich and Eva Peidich vs. Alexander Grass.

Four boys were playing ball in an open field between two avenues. The place where they were playing was on the northerly side of a traveled way leading to the other. This driveway was used by teams going to and from the ing from one avenue to the other. This driveway was used by teams going to and from the switches and the freight depot of the D. & H. Railroad Company. While one of the boys was running first in one direction; then the other, to avoidbeing touched by the ball, a heavy horse and wagon, belonging to the defendant, struck the boy and both the forward and rear wheels of the wagon ran over him, with the result that he died a few hours later.

On a rule for a judgment non obstante veredicto court held that the plaintiff was entitled to all the evidence, and to every inference which could be reasonably drawn from it and the plaintiffs' witnesses having agreed that the boy was running towards home when the accident occurred, the natural inference was that the horse was moving more rapidly than the boy and run him down. Therefore, there was no error committed in submitting the case to the jury.

Opinion by Carpenter, A. L. J., December, 1908.

Messrs. O'Brien & Kelly, for plaintiff.

Mr. R. L. Levy, for defendants.

The principal reason urged by counsel for defendant is that the evidence does not show that the defendant's driver was guilty of any negligence which caused the injury. It appeared by the evidence that on the afternoon of May 7, 1906, Frank Peidich, Michael Ferguson, James Wear and John Ready were playing ball in an open field between Capouse and Wyoming avenues in the city of Scranton. The place where they were playing was on the northerly side of a traveled way leading from Capouse to Wyoming avenue. The driveway was used by teams in going to and from the switches and the freight depot of the D. & H. Railroad Company and its northerly boundary was, to an extent, defined by three telegraph poles standing along that side. The third base was located some ten feet northerly from the line of these poles, and the home plate was some twenty-five or thirty feet away in a northeasterly direction.

Frank Peidich, who was nine years and three months of age, was between the third and the home base and endeavoring to reach home while Michael Ferguson was at the third and James Wear at the home

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base, and they were throwing the ball back and forth in a effort to touch him with it while off the base, while he was running first in one direction, then the other, to avoid them.

While they were in this position a heavy horse and wagon belonging to the defendant, and driven by William Bubersky, his employee, a man 36 years of age and an experienced driver, was crossing from Capouse avenue in the direction of Wyoming avenue, where he had been sent by his employer to unload some iron from a car which stood on a switch near Wyoming avenue and on the southerly side of the driveway. The testimony of the boys was that he drove outside of the traveled way on the northerly side of the row of poles and across the ball ground where they were playing and over the third base, or between it and the home base.

The boy Peidich was struck by the horse or by some part of the wagon, knocked down and both the forward and rear wheels on the left side ran over him with the result that he died a few hours later.

The conduct of the Peidich boy, as well as that of the driver, was minutely described by the three boys who were the only witnesses that saw the accident, except the driver, and a man who was at the time on the seat with him, but who has since disappeared, and whose testimony could not be had.

Michael Ferguson was at third base, James Wear was at the home base, and John Ready was near him at the bat. They all testified that Frank Peidich came in contact with the left side of the horse and was knocked down and that the wagon ran over him, some of them saying that both wheels on the left side went over him.

It is fair to presume that John Ready, who was waiting for his turn to bat, while the other three were engaged in running back and forth, had a better opportunity to see what transpired than the other boys had. He testified as follows:

Q. Where did the wagon come? A. It come right in through the curb and right inside of the first pole into the field.

Q. Where was Frank when he was struck? A. About five feet in out from the base towards home.

Q. How did the horse and wagon strike him? A. The left side of the horse and the shaft.

Q. What did it do? A. Knocked him down.

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Q. What then? A. Got under the horse and then under the wagon, the first wheel run over his chest and then the next wheel run over his back.

Q. How far did the wagon go before it stopped, after it ran over him? A. Away out in the road.

Q. What did you boys do when the wagon was coming along? Did you see the wagon come along? A. Yes, sir; we didn't think about it when it was right in the field.

Q. What did you do then? A. We were hollering, but he come right on, he didn't pay no attention.

Q. Who didn't? A. The driver.

Q. What was he doing? A. He was standing up looking over towards the junk shop.

The evidence shows that the junk shop was at the right and some distance away from the driver; and if he was looking in that direction he was not looking where he was driving. This is also testified to by the other boys.

This same witness, John Ready, said the horse was going on a fast trot, and the other boys say he was trotting. Two of the boys, at least, say he went fifteen or twenty feet after the boy was run over.

On cross-examination John Ready testified:

Q. And Frank ran to try to beat the ball to third? A. Yes, sir.

Q. While he was running back towards third he ran into this horse and wagon? A. No, sir. He was coming towards home when I saw him get struck.

* * * * * * * *

Q. Then the wagon was between Frank and Mike? A. Yes, sir.

Q. And Frank was running back to third to beat the ball that Jimmy Wear had thrown to Frank (Mike)? A. Yes, sir.

Q. It was when going back that way that he was struck with the wagon? A. I didn't see it that way.

Q. You saw that he was running back to third to get there? A. Yes, sir.

Q. Did he stop on his way back? A. He kind of stopped and made a little dash for home.

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Q. He went back to third and when he was near third he turned around and ran for home again? A. Yes, sir.

Q. And then it was that he struck the wagon? A. The wagon come right into him.

Q.The wagon came into him when he was running into home? A. In to home..

Q. That is, he was at home but ran back to third and when he got near third he turned around and started to run home? A. Yes, sir.

Q. When he was running home like that he was hit with the wagon? A. Yes, sir.

Q. When he was running for home and to third base in the dog chase he was running as fast as he could, wasn't he? A. Not fast at all, just going sideways.

Q. Watching the ball but trying to make it? A. Yes, sir.

Here we have evidence that four boys, one of whom was nine years old, and the others about twelve to fifteen, were playing ball in a field, not upon the highway at all, and at least ten feet from this traveled way which the public were accustomed to use. Three of them were running back and forth in a space perhaps twenty-five or thirty in length in a game which excited their keenest competition and called for their undivided attention, when the driver of this horse, without any apparent reason, leaves the traveled way and drives at a trot directly across the path upon which they are playing and instead of looking where he was driving, as it clearly was his duty to do under such circumstances, he was looking in another direction.

It is not the case of a child darting suddenly in front of a horse and being run down before the driver has an opportunity to stop. The driver could see the boys for several rods as he approached them, and if he was looking ahead he must have seen them, and it was only reasonable to suppose that if he drove across the line at any point between the third and home bases he was likely to encounter them. If his conduct was such as the boys describe it, we think he was clearly guilty of negligence.

John Ready's testimony was that at the moment when the collision occurred the Peidich boy was running towards home. The other two boys also say he was running in that direction, but their testimony is

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not so clear as that of Ready, and is somewhat confused. But the plaintiff is entitled to the benefit of all the evidence, and to every inference which can be reasonably drawn from it. Plaintiff's witnesses all agree that the boy was between the horse and the home plate, and if he was running towards home the natural inference is that the horse was moving more rapidly than the boy and ran him down. This theory is supported by the testimony of at least two of the boys, who say that the wagon went fifteen or twenty feet after passing over the boy, before it was stopped.

We are not convinced that any error was committed in submitting the case to the jury, and the rule for a new trial and rule for judgment are both discharged.

In the Court of Common Pleas of Lackawanna County.

No. 1134, September Term, 1907.

Rule for a New Trial.

Rule for Judgment Non Obstante Veredicto.

Joseph Golden vs. Mount Jessup Coal Company.

The duty of seeing that the main roads and timbering are in a safe condition is specifically committed to the mine foreman. His duty is to visit and examine every working place in the mine at least once every alternate day, while the men of such place are or should be at work, and shall direct that each and every working place is properly secured by props or timber, and that safety in all respects is assured by directing that all loose coal or rock shall be pulled down or secured and that no person shall be permitted to work in an unsafe place, unless it be for the purpose of making it secure. Act of 1891, P. L. 176.

Messrs. J. J. O'Malley & J. P. Kelly, for plaintiff.

Messrs. Watson, Diehl & Watson, for defendant.

Opinion by Edwards, P. J., December 2, 1908.

There is little contradiction, if any, in the facts of this case, and they are few and easily understood. The defendant operated a coal mine where the plaintiff was employed as a driver. At the time the plaintiff received his injury he was about seventeen years old. He had then been working in the mines two or three years, part of the time as driver of mules. He went into the employ of the defendant on August 21, 1906, and the accident occurred the next day. He had charge of a

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team of mules, driving them tandem. His work was to take empty cars along the main heading or gangway to the chambers of the miners and to take back the loaded cars. He had worked all day on the twenty-first and on the morning of the twenty-second. In a part of his testimony he thus describes the accident: "I was taking an empty up to a chamber; I was on the car, on the head end, and I was going in along the gangway road and there was a prop stood on the side of the track; and I was going in and the mules were on a nice walk, and the car hit the prop and knocked it down, and the roof came down and hit me on the arm." This is a fair and clear statement of the manner in which the accident occurred. The car, without leaving the track, hit the prop and the roof fell and injured the boy. It appears from the evidence that the prop had been placed on the side of the main gangway about midway in front of the space made by the opening of a new chamber.

The only evidence in the case explaining how and why the prop in question was placed where it stood comes from the mine foreman. We quote from his testimony:

"Q. Which was the chamber in which this prop was placed in front of? A. The last chamber up, the nearest chamber to the face of the heading.

"Q. Whether or not you supervised the opening of that chamber? A.I did.

"Q. Personally? A. Yes, sir.

"Q. Do you know anything about the placing of the prop that has been spoken of? A. Yes, sir.

"Q. Please state what you knew with reference to the placing of the prop? A. It is a slate roof in the first place, and in opening the chamber off for the first few cars the rib held the roof previous to blasting it off; after they blasted it off the roof got drummy, and the sixth or seventh day before the accident occurred I was up in that section and the miner called my atention that the roof was getting drummy. I took his drill and sounded the roof around, as is the custom, and I said, 'Here is some props here, take these props and stand them under this rock here,' and he stood the props, and this is one of the props that he stood.

"Q. Then you directed him to place the props, did you? A. Yes, sir.

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"Q. You know where the accident occurred, do you? A. I do.

"Q. Did you see the props after he stood them or placed them? A. I did; I saw the prop on the day of the accident; I was in his place.

"Q. Before or after the accident? A. About an hour or an hour and a half before the accident."

It was admitted on the record that William X. Jones was the foreman in charge of defendant's mine, in August, 1906, and that he was a duly certified mine foreman. When a motion for a non-suit was made it was refused mainly because it did not yet appear that there was a certified mine foreman in charge of the mine. We are satisfied now that after this fact was clearly established the defendant was entitled to binding instructions, although we approve of the practice, in cases like the present, of reserving a point, so as to have the question reviewed by the court in banc.

At the argument of the rule and in defendant's brief our attention has been called to the general rules found in the mine ventilation act of 1891, P. L. 176. We shall quote two only of the rules here:

"Rule 12. The mine foreman or his assistant shall visit and examine every working place in the mine at least once every alternate day, while the men of such place are or should be at work, and shall direct that each and every working place is properly secured by props or timber, and that safety in all respects is assured by directing that all loose coal or rock shall be pulled down or secured and that no person shall be permitted to work in an unsafe place unless it be for the purpose of making it secure."

We think the last clause in this rule is broad enough to cover the gangway at the point where the plaintiff was injured; but whether this be so or not Rule 13 does.

"Rule 13. The mine foreman, or some other competent person or persons to be designated by him, shall examine at least once every day all slopes, shafts, main roads, traveling ways, signal apparatus, pulleys and timbering and see that they are in safe and efficient working condition."

It will be thus seen that the duty of seeing that the main roads and the timebering are in a safe condition is specifically committed to the foreman.

The present case comes within the ruling of the supreme court in Durkin vs. Kingston Coal Co., et. al., 171 Pa., 193. We need not cite any other authorities.

Now, December 2, 1908, the rule for a new trial is discharged and judgment is entered for the defendant non obstante veredicto.

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In the Court of Common Pleas of Lackawanna County.

No. 723, May Term, 1908.

Rule to Strike off Judgment.

City of Scranton vs. Robert P. Kochler.

Verdict was returned for plaintiff. Rule for new trial was argued and discharged. An appeal was taken to the Superior Court and the judgment of the lower court was affirmed. Defendant then moved to strike off the judgment.

Held: The motion was too late as the defendant had had his day in Court.

Mr. D. J. Davis, City Solicitor, for plaintiff.

Messrs. I. H. Burns and T. P. Duffy, for defendant.

Opinion by Edwards, P. J., December, 1908.

In 1906 the jury in the above case returned a verdict for the plaintiff in the sum of $239.32. A rule for a new trial was argued and discharged. An appeal was taken to the Superior Court and the judgment of the lower court was affirmed.

The defendant now moves to strike off this judgment. We are of the opinion that the defendant has had his day in court.

The basis of defendant's motion relates to the form of the scire facias, it being alleged that the form was that prescribed by the act of 1901, the lien having been filed prior to that date. There would be some technical merit in defendant's contention had he moved in time. We think it was too late at the trial, and it is certainly too late now.

We had occasion to discuss the office of a scire facias in our opinion already filed in this case. On this point we quote from the opinion as follows:

"Is it necessary for the plaintiff, in the trial of a scire facias sur municipal lien, to offer the scire facias in evidence? It is the usual practice to do this, but we can find no authority for the proposition that a failure to do so is fatal to the plaintiff's case. It was decided long ago in Pennsylvania (the Schenly case, 36 Pa. 29) that a scire facias sur municipal lien is an original and not a judicial writ; but we need not discuss this question here. It is not difficult to determine the place or office of a scire facias sur municipal lien in the practice of our courts. It has a two-fold purpose. It is a summons and a declaration. In some states the scire facias performs the office of a summons only, and in these jurisdictions the plaintiff must file a separate declaration; but

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this is not the case in Pennsylvania. We see no reason why a defendant cannot move to quash the scire facias if it is defective as a summons, or why he cannot demur to it if it is faulty as a declaration. In case of assumpsit it is not deemed necessary to offer the summons or declaration in evidence. We never heard of a motion for binding instructions for the defendant because the summons or declaration was not offered in evidence. They are necessarily a part of the case as much as the scire facias sur municipal lien is a part of the case. Any defect in either the summons, declaration or scire facias or any material variance between the *probata* and *allegata*, can be called to the attention of the court, and any motion pertaining thereto can be made without offering the papers themselves in evidence. It is no argument against our proposition that a summons in ejectment is always offered in evidence. This is necessary on account of the sheriff's return which is prima facie proof of defendant's possession. It may be also contended that scire facias should be offered in evidence in order to establish the fact that it was issued within five years from the date of the lien. It must be remembered that we think it is good practice to offer the scire facias in evidence, although the failure to do so does not destroy the plaintiff's case."

In commenting upon this phase of the case the Superior Court says: "Our attention has not been called to any adjudication which makes the offer of the writ a necessary condition upon which a recovery may be had."

Regardless of the question of the invalidity of the writ the conduct of the defendant amounts to a waiver of any defect in the form of the writ. We have already discussed this matter in our former opinion. We quote again from the opinion of the Superior Court:

"The writ was served on the defendant. He appeared regularly but made no objection to the form of the writ. The objection to the proceeding set up in the affidavit of defense was (a) that the lien was not filed in time, (b) that the contract for the work included both the cost of construction and of repairs for the term of five years, and the plea entered subsequently attacked the lien and not the writ. If there were any evidence of informatlity in the writ we think the defendant should be demed to have waived it in view of his conduct.

The rule to strike off the judgment is discharged. An exception is noted for defendant.

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In the Court of Common Pleas of Lackawanna County.

No. 799, September Term, 1904.

Rule for a New Trial.

William S. Nyhart vs. Taylor Borough.

It was error for the court to say that if the filling in a street remained for weeks that it necessarily convicted the borough of negligence. It was for the jury to determine whether, under the circumstances, such length of time was sufficient to charge them with notice.

Mr. S. B. Price, for plaintiff.

Mr. J. E. Watkins, Borough Solicitor, for defendant.

Opinion by Carpenter, A. L. J., December, 1908.

An examination of the evidence shows that the testimony of Gomer Jones and James Morris, the admission of which is made the basis of the first two reasons for new trial, was admitted without objection.

I think there was no error in refusing to affirm plaintiff's second request without qualification. It was not for the court to say that if the filling in the street remained for weeks that it necessarily convicted the borough of negligence; it was for the jury to determine whether, under the circumstances, such length of time was sufficient to charge them with notice.

I do not think the testimony of the witnesses who testified that the plaintiff was not injured, can be fairly said to be open to the criticism that they took into consideration the general improvement caused by the grading of streets and putting in sewers. So far as their testimony appeared to be based upon that theory it was stricken out upon motion; and an examination of the testimony will show that their estimates appeared to be founded on a proper basis, if indeed, it was proper at all in this case to adopt the "before and after" rule in estimating the plaintiff's damages. It is quite doubtful if that rule can be applied to a case of this character. See Weir v. Plymouth Boro., 148 Pa., 566; McCartney v. Philadelphia, 22 Pa., Superior Ct., 257. But it was the theory upon which the case was tried on the part of the plaintiff.

The injury of which the plaintiff complains, and which he undertook to establish by his proofs, was the overflowing of his land as a consequence of raising the street, or permitting it to be raised; there

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was no allegation or proof that the access to his lot was obstructed, or interferred with. And there was evidence that now, that the property has been connected with the sewer, the difficulty from water has been overcome.

We are not convinced that any error was committed in the trial of the case of which the plaintiff has a right to complain.

The rule for a new trial is discharged.

In the Court of Quarter Sessions of Lackawanna County.

No. 417 October Sessions, 1907.

Rule for New Trial.

Commonwealth vs. A. F. Duffy.

Conversion of a trust fund to any other use than that of the cestui quo trust is prima facie fraudulent, and the trustee's failure to pay on settlement of his account is evidence of such conversion.

Mr. Joseph O'Brien, District Attorney, for Commonwealth.

Messrs. M. E. McDonald and R. L. Levy, for defendant.

Opinion by Carpenter, A. L. J., December, 1908.

The defendant was convicted of embezzlement as trustee under section 113 of the act of 31st March, 1860. The reasons for a new trial all relate to the sufficiency of the evidence to sustain the conviction.

The defendant was assignee for the benefit of cerditors of Z. D. Edwards. It was shown by the records of the court of common pleas that there came into his haids as assignee upwards of eleven thousand dollars. His account having been filed and referred to an auditor it was found and adjudged that he had in his hands upwards of fifteen hundred dollars of the funds of the estate. After such adjudication frequent and repeated demands were made upon him, but he failed to turn over any part of the said sum.

This evidence was clearly sufficient to convict the defendant of embezzlement under the act of assembly. It is not material when the intent to defraud was formed. Conversion of the trust fund to any other use than that of the cestui que trust is prima facie fraudulent, and the trustee's failure to pay on settlement of his account is evidence of such conversion. Com. vs. Kaufman, 9 Pa. Superior Ct., 310.

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There was no evidence in the case to rebut the presumption of a fraudulent conversion arising from default of payment, and the defendant was properly found guilty.

And now, December , 1908, the rule for a new trial is discharged.

Declarations of one of the parties to an alleged marriage the fact of which is in issue, since deceased, made pending the period of cohabitation disaffirming the marriage, are held, in Drawdy v. Hesters (Ga.) 60 S. E. 451, 15 L.R.A. (N. S.) 190, to be admissible under the principle of *res gestae* for the purpose of showing the character of the cohabitation, where cohabitation is relied upon as a circumstance material to the issue.

In an action against a physician for death alleged to have been occasioned by the negligent administration of chloroform, it is held, in Boucher v. Larochelle (N. H.) 68 Atl. 870, 15 L.R.A. (N. S.) 416, not to be necessary, in order to recover, to exlude other possible causes of death, it being sufficient to show that this was the probable cause.

Dying declarations are held, in State v. Hood (W. Va.) 59 S. E. 971, 15 L.R.A. (N. S.) 448, not to be inadmissible because it does not appear that the declarant believed in God, and rewards and punishment after death.

Where damages to a wife, resulting from defendant's actionable fault, have in no part been caused by the wife's own wrong, it is held, in Mageau v. Great Northern R. Co. (Minn.) 115 N. W. 651, 15 L.R.A. (N. S.) 511, that two distinct causes of action may accrue, one to her for the direct injuries to her person and the like, the other to her husband for the consequential injuries to him consisting of loss of her services and society, and of the expense to which he may have been put, and the like.

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In the Court of Common Pleas of Lackawanna County.

No. 196, September Term, 1908.

Replevin.

Rule for a New Trial.

Rule for Judgment Non Obstante Veredicto.

United States Circle Swing Co. vs. Reynolds, et. al.

Evidence on the one side placed the value of property at $6,600 and on the other side at $1,000. The jury rendered a verdict of $3,350.
Held: The verdict was a reasonable one under the evidence and should not be disturbed.

Mr. Clarence Balentine, for plaintiff.

Mr. M. J. Martin, for defendants.

Opion by Edwards, P. J., December 16, 1908.

This action of replevin, as originally brought, was against Annette Reynolds and Arthur Frothingham, trading as Rocky Glen Park Company. William B. Reynolds claimed the property and was allowed to intervene. He also gave the claim property bond required by the act of assembly. The only issue in the case was as between the plaintiff and William B. Reynolds, and the jury was sworn as to them only.

There were no disputed questions of fact in the case outside of the value of the property levied on. Even the ownership of the property, a circle swing amusement device, was practically out of the case, because Reynolds, the defendant, at the trial disclaimed the ownership of all of the property except six air boats, which the plaintiff admitted to be the property of the defndant.

The evidence as to the value of the property was contradictory, varying from about $6,600 on one side to $1,000 on the other side. The jury returned a verdict of $3,350 for the plaintiff and found for the defendant for the "six cars of airship design." The verdict is a reasonable one under the evidence. We see no reason to disturb the verdict on the ground that it is excessive.

Another question in the case relates to a remark made by the plaintiff's counsel in his address to the jury. He characterized two of the defendant's witnesses as "a pair of unmitigated pirates." Defend-

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ant's counsel objected and asked that a juror be withdrawn. We refused to do this after properly admonishing the jury. Although defendant's counsel denies making the remark in the manner alleged we shall treat the question as if he had made the remark in the words quoted. Taking this view of the matter, we are of the opinion that the jury, notwithstanding the remark, were not influenced by it. The verdict shows this. As authority on this question we refer to Com. v. Windish, 176 Pa., 167; Com. v. Sarves, 17 Sup. Ct., 407; Moore v. Neubert, 21 Sup. Ct., 144; Brewery Co. v. Weiss, 23 Sup. Ct., 519.

Believing that the verdict in this case ought to stand we refuse to disturb it. The rule for a new trial is discharged and the rule for judgment non obstante veredicto is also discharged. Judgment is allowed to be entered on the verdict.

Upon the question whether or not a representation by an applicant for insurance that he was temperate in the use of intoxicating liquors was false, it is held, in Taylor v. Security Life & A. Co. 146 N. C. 383, 59 S. E. 139, 15 L.R.A. (N. S.) 583, that witnesses may, after stating the basis of their information, state whether he was temperate or intemperate.

That it is the duty of an elevator operator who knows that a boy is riding on top of the car to use ordinary care to prevent his injury, even if he is treated as a trespasser, is declared in Davis v. Ohio Valley B. & T. Co. (Ky.) 106 S. W. 843, 15 L.R.A. (N. S.) 402; and the master is held to beliable for the former's failure to do so, although at the precise moment of

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A litigant having been sued in the circuit court of the United States as a resident of Illinois, and having obtained the benefit of an exception to the effect that he has his domicil in Louisiana, is held, in Caldwell v. Morris (La.) 45 So. 927, 15 L.R.A. (N. S.) 423, to be estopped, when sued at such domicil, to plead to the jurisdiction of the state court on the ground that he is domiciled in Illinois.

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In the Court of Common Pleas of Lackawanna County.

No. 1661, September Term, 1907.

Rule for a New Trial and Rule for Judgment Non Obstante Veredicto.

Laura A. Gregory vs. W. S. Hulslander.

Where the weight of the evidence clearly preponderates in favor of the defendant a new trial should be granted.

While the amount of a verdict is not supported by any theory of the case yet this in itself will not justify the setting aside of a verdict.

Messrs Leach & Morrow, for plaintiff.

Mr. S. B. Price, for defendant.

Opinion by Carpenter, A. L. J., December, 1908.

One of the reasons assigned for a new trial is that the verdict is against the evidence. This is a reason which is frequently made use of, but which seldom succeeds, and properly so. But as to one branch of this case it seems to me the evidence is such as to make it the plain duty of the court to set aside the verdict. The defendant testified that of the money which came into his hands he paid fifteen hundred dollars to S. N. Stetler for his services in bringing about the sale of the property. True, his testimony as to the manner of making the payment was conflicting, but he was positive that it was made. The circumstances surrounding the transaction and the testimony of Mr. T. F. Wells tend to corroborate his contention. Mr. Wells purchased the property through negotiations carried on by Mr. Stetler, who is since deceased, and whose testimony, therefore, could not be had, but it is reasonable to presume that he was paid for his services in some manner. Mr. Wells says he paid him nothing; and there is no evidence in the case that he received any compensation from any other source. And Mr. Wells testified that he had an impression, indistinct though it was, that Stetler was to receive his compensation from Huslander.

The defendant testified in the first instance that when he received the first payment of $1,500 from Wells by check on the Lackawanna Trust Company he went with Stetler to the bank and drew the money and handed it to Stetler; but the check was put in evidence and showed that it was put through the Scranton Savings Bank and it was shown that Huslander's account at the latter bank had credit for $1,100 on

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the same day, part of a check for $1,500; and it was claimed that the inference to be drawn from this circumstance was that Hulslander did not pay anything to Stetler. He, however, states positively that he did pay the full amount of $1,500 to him.

There is nothing to controvert defendant's positive assertion except the inference to be drawn from the circumstance above referred to, yet the verdict shows that the jury adopted it. But the weight of the evidence so clearly preponderates in favor of the defendant that we feel constrained to grant a new trial.

There is another feature of the case in which it is difficult, if not impossible, to reconcile the verdict with the evidence. It is undisputed that the defendant received $6,217 from the sale of the property. The plaintiff claimed that the defendant was to have one-half of this, less her outlays, and that such outlays amounted to $1,697; which, deducted from the selling price, leaves $4,520 to be divided between them, one-half of which is $2,260. Plaintiff admits that she received $1,000 about December 9, 1904. This deducted from $2,260 leaves $1,260. If to this be added her expenses of $1,697 it makes $2,957 due her, exclusive of interest. But the written verdict presented by the jury shows that they found for the plaintiff the sum of $3,357 as principal, to which they added $763 as interest from December 9, 1904, the date when defendant received the last instalment of purchase money, making the verdict $4,120.

While the form of verdict prepared in the jury room, though handed to the clerk, is not the verdict, and is no part of the record, yet in searching for a theory upon which to reconcile the verdict with the evidence, it may serve to show that the verdict which the jury rendered was not warranted by the evidence under the method which they adopted in arriving at it.

The particular amount which the jury returned does not appear to be supported by any theory of the case; and while this of itself might not justify setting aside the verdict, it shows that it is impossible, by remitting the sum which defendant, under the evidence should have been allowed, to make the verdict conform to any theory upon which the jury could properly have based the verdict.

The rule for judgment is discharged. The rule for a new trial is made absolute.

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In the Court of Common Pleas of Lackawanna County.

No. 1016, March Term, 1906.

Exceptions to Affidavit of Defence and Rule for Judgment.

Stephen C. Millard, Exr., et. al. vs. Delaware, Lackawanna & Western Railroad Company.

The coal under a tract of land vested in defendant by an indenture called a coal lease. As owner the defendant became personally liable to assessment thereafter for the taxes on the unmined coal. The taxes were assessed against the lessors for years after the lease was executed and paid by their representatives without compulsion. No actual notice of the assessment was brought home to defendant, nor was it requested to pay the taxes.

The plaintiff averred payment, by mistake of that which the defendant ought to have paid, and thus invoked the equitable principle of unjust enrichment.

The averment of mistake was only formally denied. Held: As this was an essential averment it may be questioned whether it was fairly controverted by a mere naked denial, amounting to no more than the affiant's conclusion. As concerns the legal liability to assessment, the status of the parties was fixed by the character of the lease, together with the subject matter of the payments, the quantity of the coal and the amount of the taxes as assessed from year to year, coupled with plaintiffs' failure to make the demand on the defendant or seek to have the assesment transferred, the question inevitably arrises: Was not the mistake merely one of law? Having paid the taxes repeatedly without compulsion or question as to who ought to pay them the plaintiffs' right to recover as for an involuntary payment is not free from doubt. To doubt in such case is to decide in favor of its submission to a jury.

Messrs. W. J. Torrey and J. S. Harding, for plaintiffs.

Messrs. Williard, Warren & Knapp, for defendant.

Opinion by Newcomb, A. L. J., December 14, 1908.

The equities here are apparently with the plaintiffs. But on the question of their legal right to recover the case is close. If the exact facts were before us on a case stated it could be determined at this time.

The plaintiffs, or those whom they represent, were owners in fee of a tract of seated land in this city. Many years ago title to all the coal therein, minable at an agree standard of profit was severed by their indenture, called a coal lease, and became vested in the defendant. The term of the lease was during such time as should be required to exhaust the coal at the stipulated rate of production. Lessee went into possession accordingly, has been in possession of the demised premises ever since, and the lease is still operative. As owner it thus became personally liable to assessment thereafter for the taxes on the unmined coal to

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which they took title. How the taxes were assessed during the earlier years does not appear. From 1902 to 1906, inclusive, they were assessed against the lessors and paid without compulsion by the plaintiffs, as their representatives. No actual notice of the assessment was brought home to defendant, nor was it requested to pay the taxes.

The solequestion, it is believed, is whether there is enough on the present showing to take the case out of the general rule as to voluntary payments. That was the only question discussed at the argument, although by a brief submitted in the meantime another one is sought to be raised by defendant. It takes the ground that the lease is capable of being construed as implying an agreement on part of the lessors to pay the taxes, and that the continuous payment by them from the start shows such construction by the parties, thereby determining its construction by the court.

This position is believed to untenable. In the first place it no where distinctly appears that the taxes were so paid from the start. In the second place the conduct of the parties is never resorted to for such purpose except where the terms of their written contract are ambiguous. In this instance there is no ambiguity. So far as they undertook to say anything in the paper on the subject of taxes their meaning was expressed clearly and without uncertainty. With any supposed uncertainty of intention about things as to which they didn't attempt to have the writing speak, its construction has nothing to do. It is the meaning of the terms employed, not those omitted, which, if uncertain, may be inferred from the conduct of the parties to the writing.

But while the defendant's contention in this particular is not well founded it suggests the crucial point in the case as it is now presented.

The plaintiffs aver payment, by mistake, of that which defendant of right ought to have paid, and thus invoke the equitable principle of unjust enrichment. The averments are that the taxes on the coal estate were assessed against the lessors by mistake of the taxing officers and by them paid on the mistaken assumption that the assessment was on such estate as they still had in the demised premises. Upon this it is urged that the payment cannot be regarded as intrusive because it is presumed to have been in relief of plaintiffs' interest, an estate in the

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nature of a reversion after the exhaustion of all veins minable at the standard of profit defined in the lease. Other than the assertion in the first affidavit of defence that the payment was in conformity with the terms of the lease, the averment of mistake is only formally denied. As this is an essential averment it may be questioned whether it is fairly controverted by a mere naked denial, amounting to no more than the affiant's conclusion. Be that as it may, when it is considered that, so far as concerns the legal liability to assessment, the status of the parties was fixed by the character of the lease, together with the subject matter of the payments, the quantity of the coal and the amount of the taxes as assessed from year to year, coupled with plaintiffs' failure to make demand on the defendant or seek to have the assessment transfered, the question inevitably arises: Was not the mistake merely one of law? In other words on the whole case as now presented the plaintiffs fail to make it clear that the payments were made otherwise than in ignorance of the effect of the lease as fixing defendant's liability. So while it is apparent that there was no stipulation, either express or implied, on part of the lessors to pay these taxes, it is doubtful whether they did not pay them because they assumed they were legally liable in the absence of an agreement to the contrary. If that be so, the mistake involved would be one of law and not of fact. I do not understand that a mere mistake as to a legal right or liability where one has knowledge or means of knowledge of the facts will make such payment involuntary, or warrant a recovery even though it be against conscience for the defendant to retain its benefit.

Keener on Quasi Contracts, 85-112.
R. T. Sav. Inst. v. Linder, et ux., 74 Pa., 371.
Gould v. McFall, 118 Pa., 455.

The learned counsel for the plaintiffs relies upon the doctrine of Iron City Tool Works v. Long & Co., 4 Sad Pa. Sup. Ct., 57, and kindred cases. But there the mistake was one of fact and was so found by a jury. In Hogg v. Lonstreth, 97 Pa., 255, the taxes had been assessed against the defendant personally while in possession as owner. The land was subject to a mortgage which was afterwards foreclosed against the mortgagor, and the defendant as terre tenant. Becoming the purchaser at the foreclosure sale plaintiff went in possession and was then

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compelled to pay defendant's taxes, in part to prevent a sale of the land on tax liens which had been put in judgment, and the balance to save his personal property from seizure by the tax collector. Manifestly these facts repelled any inference of a voluntary payment. So here if the assessments had been against the defendant and the plaintiffs had paid the taxes to prevent a sale after defendant's refusal to pay, a different question would be presented. But having paid the taxes repeatedly without compulsion or question as to who ought to pay them the plaintiffs' right to recover as for an involuntary payment is not free from doubt on this motion. To doubt in such case is to decide in favor of its submission to a jury.

The rule for judgment is discharged.

The fact that a statute of set-off permits judgment to be taken by the defendant for a balance found due him is held, in Huffstutler v. Louisville Packing Co. (Ala.) 45 So. 418, 15 L.R.A. (N. S.) 340, not to preclude the plaintiff from taking a nonsuit, or from dismissing his case at any time before verdict, where the right is not denied by statute although defendant has interposed a counterclaim entitling him to affirmative relief.

Upon th question of damages to be awarded to abutting owners for the condemnation by an iterurban railway of the right to operate cars along the tracks of a street railway operated under a limited franchise, it is held, in Gosa v. Milwaukee Light, H. & T. Co. (Wis.) 114 N. W. 815, 15 L.R.A. (N. S.) 531, that the fact that the right to continue the tracks was made perpetual should be tken into consideration, and also, in mitigation of damages, the fact of the existence of the street railway, which, under its franchise, must continue to operate the road for a considerable period of time.

That equity has no jurisdiction of a bill brought solely for the construction of a will which disposes merely of legal estates, is held, in Hart v. Darter, 107 Va. 310, 58 S. E. 590, 15 L.R.A. (N. S.) 599.

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In the Court of Quarter Sessions of Lackawanna County.

No. 425, April Sessions, 1904.

Motion for a Rule to Vacate Decree of Annexation.

In Re: Annexation of part of Lackawanna Township to the City of Scranton.

The question of the constitutionality of the annexation act can be raised in the Court of Common Pleas.

Opinion by Edwards, P. J., December 15, 1908.

The territory known as "Lincoln Heights," a part of Lackawanna Township, was annexed to the City of Scranton by decree of the Court of Quarter Sessions, in August, 1904, the decree becoming operative January 1, 1905. After the time for filing exceptions had expired a rule was granted to show cause why certain citizens should not be allowed to intervene and why the decree should not be vacated. This rule was discharged on August 7, 1905, "without prejudice to the right of any proper party to raise the question of the constitutionality of the annexation act." At the time this order was made we held that the time for exceptions had gone by and that the application to vacate the decree came too late. We were of the opinion, nevertheless, that the constitutionality of the annexation act could be attacked by a taxpayer's bill, or in some other way, in the common pleas. Hence the qualification in the order discharging the rule made August 7, 1905. As a matter of fact the question has been raised in the common pleas.

The rule now asked for to vacate the decree of August, 1904, is refused.

That contempt is not the proper remedy against one who publishes a newspaper article reflecting on the conduct of a judge in the performance of the ministerial duty of keeping account of the fees, emoluments, expenses, etc., of his office, is declared in Hamma v. People (Colo.) 94 Pac. 326, 15 L.R.A. (N. S.) 621, although the publication may interfere with and embarrass the administration of justice, and tend to bring the court and judge into disrepute, destroying public confidence in both, and impairing their usefulness.

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In the Court of Common Pleas of Lackawanna County.

No. 7, May Term, 1908.

Equity.

Rule to Show Cause why the Decree Dismissing the Bill Should not be Changed or Set Aside.

Henry Frey vs. Matthias Stipp.

The relief afforded by a decree in equity must conform to the case as made out by the pleadings as well as to the proofs. Every fact essential to entitle a plaintiff to the relief which he seeks must be averred in the bill. Neither unproved allegations nor proof of matters not alleged can be made a basis for equitable relief.

Messrs. S. B. Price and T. F. Wells, for plaintiff.

Mr. R. A. Zimmerman, for defendant.

Opinion by Edwards, P. J., December, 16, 1908.

When the plaintiff's case was closed defendant's counsel moved to dismiss the bill without hearing evidence on behalf of the defendant. The reasons upon which the motion was based are found in the record. The motion was allowed and a rule was granted to show cause why the order or decree dismissing the bill should not be changed, the rule to be argued before the court in banc.

A brief statement of the reasons why the bill was dismissed was filed at the time the motion was allowed. We are of opinion, after argument, that the reasons given then hold good now and that plaintiff's bill should be finally dismissed. "The relief afforded by a decree in equity must conform to the case as made out by the pleadings as well as to the proofs. Every fact essential to entitle a plaintiff to the relief which he seeks must be averred in the bill. Neither unproved allegations nor proof of matters not alleged can be made a basis for equitable relief": Luther v. Luther, 216 Pa., 1. As to the quality and insufficiency of plaintiff's proof we refer to the reasons already placed on record.

In addition to what has already been stated we desire to refer briefly to some other features of the case as disclosed in plaintiff's testimony.

1. The plaintiff had been a stockholder of the Tripp Park Throwing Company for over a year before he bought defendant's stock. He

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attended a stockholders' meeting in December, 1907, where the condition of the company was discussed and when it was proposed to employ an expert to examine and report as to the financial affairs of the company. In two weeks, at another meeting of the stockholders at which plaintiff was present, the expert's report was read. Subsequently the plaintiff became a director of the company. He became a director about two weeks before he purchased defendant's stock. These facts are important only because they show that the plaintiff had abundant opportunities to inform himself as to the financial condition of the company and the value of its stock.

2. The evening before the day the plaintiff and defendant met to make their bargain the directors of the company, including the plaintiff, met and authorized the secretary to open negotiations with the defendant looking to the purchase of his stock. The next day, the plaintiff, without waiting to hear from the secretary and without the knowledge of his co-directors, entered into the agreement with defendant which he is now seeking to set aside. Under these circumstances we do not think the plaintiff has the right to come into a court of equity.

The rule to set aside the decree dismissing the bill in this case is discharged.

FINAL DECREE.

Now, December 16, 1908, this cause came on to be heard at a regular term of equity court and was argued by counsel, and upon consideration thereof it is ordered, adjudged and decreed that the plaintiff's bill be dismissed at the plaintiff's costs.

An exception is noted for plaintiff.

Wilful failure of an attorney to be present in court on the calling of his case which he has had adjourned, and wilful failure to return promptly when thereafter excused for a few minutes to attend to a case in another court, is held, in Ex parte Clark, 208 Mo. 121, 106 S. W. 990, 15 L.R.A. (N. S.) 389, to be a criminal contempt for which he cannot be punished without notice and reasonable time in which to make his defense.

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In the Court of Common Pleas of Lackawanna County.

No. 561, May Term, 1907.

Rule for a New Trial.

H. F. Traeger vs. Trustees of the Salvation Army.

Where on the face of the paper title the location of the division line between the parties is open to dispute, the question must go to the jury if there is evidence tending to support the plaintiff's contention.

Mr. C. R Pitcher, for plaintiff.

Mr. John F. Scragg, for defendants.

Opinion by Newcomb, A. L. J., December 7, 1908.

This action is ejectment for a triangular piece of land having a base of about 8¼ feet and sides each less than 77 feet. The parties own adjoining lots on Price street this city. The location of the division line is the matter in dispute. The common source of title is Michael O'Meara, who owned an unplotted piece of land at the southeasterly intersection of Price street and Main avenue. It was one hundred feet westerly on the avenue, and extended the same width three hundred and thirty feet easterly along Price street. Out of this he sold the westerly 200 feet to Bishop O'Hara. Of the balance —130 feet on the street—he died seized, and by sundry mesne conveyances that has become vested in the plaintiff. The 200 feet was conveyed by Bishop O'Hara to Conrad Schroeder, who plotted it and afterwards sold the two easterly lots to the defendants. As plotted they were lots 8 and 9, each fronting 22 feet northerly on Price street. In his deed to defendants they are described as 44 feet on the street by 100 feet deep and "rectangular" in shape. If rectangular, it was agreed the plaintiff had no case. It was so ruled as a matter of law and a verdict for defendants was directed accordingly. In this it is believed there was error.

So far as the paper title is concerned the ultimate question upon which the case turns is whether the easterly line of the 200 feet sold to the bishop was at right angles with Price street. This the plaintiff sought to controvert by showing it to be parallel with the avenue which doesn't, he alleges, intersect the street at right angles. Upon more mature consideration we think a question of fact is thus raised to be decided by a jury.

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By this it is not meant to say that, if found in plaintiff's favor, that fact would necessarily be conclusive. Whether so or not might depend on the extent and character of the possession taken by O'Meara's grantee with his knowledge and acquiescence. All that is now attempted to be decided is that on the face of the paper title the location of the division line between the parties is open to dispute which must go to a jury if there is evidence tending to support the plaintiff's contention.

The rule for new trial is made absolute.

The constitution rights of a corporation to contract are held, in Lawrence v. Rutland R. Co. 80 Vt. 370, 67 Atl. 1091, 15 L.R.A. (N. S.) 350, not to be impaired by requiring it to pay its employees weekly.

Permitting a humane-society officer, in his discretion, to ake possession of neglected and abandoned animals and create without notice a lien upon them for their care, is held, in Jenks v. Stump (Colo.) 93 Pac. 17, 15 L.R.A. (N. S.) 554, to violate the constitutional guaranty of due process of law, the statute not providing for the payment of any surplus to the owner upon the sale of property in satisfaction of the lien, and no public necessity existing for the seizure.

The power of the legislature to confer upon the governor power to appoint a board to control a city's fire department is denied in Davidson v. Hine (Mich.) 115 N. W. 246, 15 L.R.A. (N. S.) 575, in view of the right of local self-government.

When an administrator has a right of action under the statute imposing a lability for the wrongful death of a person, it is held, in Jacksonville Electric Co. v. Bowden (Fla.) 45 So. 755, 15 L.R.A. (N. S.) 451. that he may recover the value, at the decedent's death, of the prospective earnings and savings that, from the evidence, could reasonably have been expected but for the death of the decedent.

The right of a husband to recover on an antenuptial contract by which his wife agrees to pay him for her care, support, and nursing during their marriage is denied in Ryan v. Dockery (Wis.) 114 N. W. 820, 15 L.R.A. (N. S.) 491.

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In the Court of Common Pleas of Lackawanna County.

No. 654, January Term, 1907.

Case Stated.

A. M. Harris vs. Taylor Borough School District.

The adjustment of liabilities between two municipalities consequent upon a change in their territorial limits, territory being taken from one and annexed to the other, is a matter between the municipalities themselves and can in no way affect creditors, or third parties.

The proposition is a reasonable one that a creditor holding the bonds of a school district has a lien on all the property of the district and when land is taken from that district and annexed to another that he has the right to proceed against either or both districts until the debt is paid by one or the other.

The act of 1887, P. L., 285, specially provides how such rights and liabilities shall be adjusted when adjacent tracts of land shall be annexed to a borough and, thereby, to a school district.

Messrs. Welles & Torrey, for plaintiff.

Mr. John R. Jones, for defendant.

Opinion by Edwards, P. J., December 2, 1908.

In 1900 the Lackawanna Township School District issued bonds in the sum of $14,000, of which the plaintiff became the owner of $5,000. The present suit is brought to recover the latter sum with interest. While the case stated sets forth numerous facts, we need refer only to a few in order to define and determine the controversy submitted to our consideration.

1. In October, 1901, by decree of the court of quarter sessions, certain out-lots and other tracts of land lying in Lackawanna Township were annexed to the Borough of Taylor, and, consequently became a part of the Taylor Borough School District.

2. In the same year an auditor was appointed under the provision of the act of June 1, 1887, (P. L. 285) to ascertain, *inter alia*, the liabilities and rights of the two school districts as affected by the change on the territorial limits of the borough and township. The auditor reported that the Lackawanna Township School District after a proper adjustment owed the Taylor Borough School District the sum of $9,390.63. Exceptions were filed to the auditor's report and the report was referred back to the auditor. Nothing has been done with the report since. This is no fault of the auditor. The court suggested that the matter be held in abeyance until the conflicting rights of the township

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and the borough involving other territorial changes, as well as the rights of the school districts, should be adjusted at one time and levies made accordingly. But this is neither here nor there now, and the delay has nothing to do with this case.

3. Plaintiff, A. M. Harris, brought suit in 1906 aganst the Lackawanna Township School District in our court of common pleas and obtained judgment for $5,924.66, with interest from Septmber 26, 1906. This judgment covers the same bonds involved in the present case stated.

The foregoing statement of facts is a sufficient basis for the determination of the present suit.

There are three legal questions involved.

1. Does the fact that an auditor was appointed to adjust the indebtedness between the two school districts and that he reported a debt of over $9,000 due the borough school district from the township school district affect the plaintiff in this suit in any way?

We answer this question in the negative. The adjustment of liabilities betwen two municipalities consequent upon a change in their territorial limits, territory being taken from one and annexed to the other, is a matter between the municipalities themselves and can in no way affect creditors, or third parties. All references in the case stated to the auditor and his report and to the proceedings thereon are immaterial.

2. Does the fact that the plaintiff has already brought suit and has recovered judgment against the Lackawanna Township School District on the same claim preclude him from also recovering judgment in the present case against the Taylor Borough School District?

We answer this question in the negative. He can proceed against either or both municipalities until his claim is satisfied.

3. Does the fact that the part of Lackawanna Township annexed to Taylor Borough forms only a part of the borough, and of the school district, prevent the plaintiff from bringing suit against the Taylor Borough School District?

This is the main question in the case. If the land taken from the township was formed into a separate municipality and a separate school district, there would be no difficulty in

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answering the third question in the negative, because the controversy would then be decided in accordance with the doctrine laid down in Plunkett's Creek Township v. Crawford, 27 Pa., 107, and in Township of Upper Darby v. Borough of Lansdown, 174 Pa., 203, as well as in other cases. In the present case the land annexed to the borough and school district constitutes only a small part of the borough. The other part of the borough school district had nothing to do with the indebtedness of the Lackawanna Township School District, and the argument is that it would be inequitable to levy any taxes against the larger part of the school district to pay an indebtedness that never was a charge against that part of the district. This argument would be unanswerable were there no way provided by which the two school districts can adjust the equities between themselves. In the case as it is now before us no hardship would follow the recovery of a judgment against the defendant. If the defendant pays the judgment the Lackawanna Township School District would owe the Taylor Borough School District about $15,000 instead of $9,000 reported by the auditor; but the law must be construed so as to satisfy various conditions. Let us suppose that the debit was the other way and that the Taylor School District was a debtor to the other school district and not a creditor. In such a case we know of no reason why the Taylor School District or the court could not order a special levy on the part annexed to pay its pro rata share of the indebtedness. This would certainly be equitable; but, we are not called upon to decide this question now. In whichever way the equities could be worked out, we believe the proposition is a reasonable one that a creditor holding the bonds of a school district has a lien on all the property of the district and when land is taken from that district and annexed to another that he has the right to proceed against either or both districts until the debt is paid by one or the other.

As apparent authority against the proposition above stated our attention has been called to the case of Borough of North Lebanon v. Arnold, et. al. 47, Pa. 488. In this case it appears that several of the inhabitants of the Borough of North Lebanon secured the passage of an act of assembly annexing them to the Township of North Lebanon. At the time of annexation the borough was in debt. In order to compel

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the seceding citizens to pay their pro rata share of this debt the burgess of the borough brought proceedings in equity against them as individuals. A demurrer to the bill was sustained on the ground that there was no individual responsibility in such a case. The judgment of the court below was affirmed in a per curiam. There can be no question as to the correctness of the decision under the particular facts of the case and under the law as it existed in 1864 when the decision was rendered. At that time there was no legislation by which municipalities could adjust among themselves the rights and liabilities following a change of territorial limits. Now it is different. The act 1887, P. L. 285, specially provides how such rights and liabilities shall be adjusted when adjacent tracts of land shall be annexed to a borough and, thereby, to a school district. For this reason we do not consider the case cited as authority on the question now before us.

Without further discussion we decide the present case in favor of the plaintiff. In accordance with the stipulation of the case stated we direct judgment to be entered in favor of the plaintiff and against the defendant for the sum of $5,587.50, with interest as follows: On $5,000 from May 1, 1905; on $237.50 from May 1, 1905; on $187.50 from November 1, 1905; on $162.50 from May 1, 1906. Let plaintiff's attorney compute the interest and by praecipe direct the prothonotary to enter judgment for the full amount of debt, interest, as of this date. An exception is noted for defendant.

That a judgment in some form declaring an escheat must be obtained before the state can get property subject to forfeiture is held, in Louisville School Board v. King (Ky.) 107 S. W. 247, 15 L.R.A. (N. S.) 379, although a statute declares that the commonwealth may enter upon an dtake possession of the land.

A contract by a railroad company to locate a station at a given point is held, in Atlanta & W. P. R. Co. v. Camp (Ga.) 60 S. T. 177, 15 L.R.A. (N. S.) 594, not to be *per se* void, but to be enforceable against the company so long as it is possible for it to discharge the duties owed by it to the public and at the same time discharge the duties incumbent upon it by the contract.

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In the Court of Common Pleas of Lackawanna County.

No. 10, March Term, 1908.

In Equity.

Mandatory Injunction.

John McCabe, et. al. vs. W. W. Watt and the Finn Coal Company.

In 1903 W. W. Watt, et. al., leased to Wade M. Finn, et. al., a certain tract of coal land. According to the terms of the lease there was demised to the lessees "all the coal upon and under the land mentioned * * * with the sole right to mine and remove said coal until all the merchantable coal has been mined and removed from said premises * * * Together also with the right to occupy for mining fixtures and for any purpose connected with the mining of said coal, all of the surface of said land."

The lessees on their part agreed "to mine and remove all of the merchantable coal under the said tract of land, which can, by the use of due diligence, be mined and removed." The lease was assigned in the same year (1903) by the lessees to the Finn Coal Company. The plaintiffs' bill sets forth that in 1901 a mine fire began under and over the surface of the said tract of land which seriously threatened the health and property of the plaintiffs.

The plaintiffs pray that the defendants may be compelled to abate the nuisance and to stop the further progress of the fire.

The first dispute arising from the evidence was as to the time of the origin of the fire. After considering the conflicting testimony the Court held, that the fire began some time in 1902. The Court further held that the fire at the beginning was very slight and could have been easily extinguished. It was not then dangerous; it was not a nuisance. Furthermore, that neither Finn & Co. nor their foreman knew anything of the fire during the year 1903; nevertheless, by the use of proper diligence they could have discovered a surface fire in that year and they could easily have ascertained that there was danger of such a fire extending to the coal measures and thus developing a mine fire.

The plaintiffs claim that the lessees had some control over the surface from the beginning and that they have been negligent in permitting the fire to spread unmolested through and over the surface.

Held: The Court does not agree with the plaintiffs in this contention. The lessees leased to Finn & Roderick not only all the coal upon and under the surface, but the right to occupy all the surface for any purpose connected with the mining of the coal.

The defendant, W. W. Watt, and his co-lessors, were guilty of no negligent act in connection with said fire.

The approximate cause of the nuisance, alleged to exist, was the negligent act of said lessees, the Finn Coal Company, in failing to suppress the aforesaid fire and failing to watch the same and prevent it from spreading.

The proposition that the owner of property cannot release himself from liability for a nuisance, or for that which may grow into a nuisance, by transferring title, is a well recognized principle of law and should be applied when its application is justified by the facts.

When a final decree shall be made it will be to the effect that Finn & Co. shall proceed forthwith and with due diligence to abate the nuisance by suppressing the fire, or confining it within safe limits, so that it shall cease to injure the plaintiffs and the public in their health and property.

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Held: The execution of such a decree would require no supervision on the part of the Court. The question of method would be left entirely to the defendants.

Messrs. Gramer & Horton and Messrs. Vosburg & Dawson, for plaintiffs.

Messrs. O'Brien & Kelly and Mr. H. C. Butler for W. W. Watt.

Mr. M. J. Martin for the Finn Coal Company.

Opinion by Edwards, P. J., December, 1908.

The parties as given above in the title of the case are those now before the court. The name of the City of Carbondale was added to the original plaintiffs; and, on demurrer, all parties defendant were stricken from the record, leaving as defendants only W. W. Watt and the Finn Coal Company.

The plaintiffs' bill sets forth that the Finn Coal Company, in January, 1903 leased from W. W. Watt and others a certain tract of coal land, and mined coal therefrom; that a mine fire developed in and upon the said premises; that this mine fire began in 1901 and continued to spread under and over the surface of said land to such an extent as to seriously threaten the health and property of the plaintiffs and of a large number of other citizens of Carbondale. The plaintiffs pray that the defendants may be compelled to abate the nuisance and to stop the further progress of the fire. This is the substance of plaintiffs' bill. The amendment to the bill avers that the fire can be extinguished or confined within safe limits, by means in ordinary use; and that the fire being under and upon the surface of the land it is the duty of the two defendants, one or both, to abate the nuisance. The answers of W. W. Watt and the Finn Coal Company will be referred to later in our discussion of the case.

From the pleadings and the evidence we find the following

FACTS.

1. By indenture dated January 3, 1903, W. W. Watt, one of the defendants, with others, leased to Wade M. Finn and Edward Roderick, a certain tract of coal land, situate in the city of Carbondale, and consisting of about fifty acres. According to the terms of this lease there was demised to the lessees "all the coal upon and under the land mentioned * * * * except the coal under a certain street known as

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Clark avenue, upon the said tract, with the sole right to mine and remove said coal until all the merchantable coal has been mined and removed from said premises. * * * * Together also with the right to occupy for mining fixtures and for any purpose connected with the mining of said coal, all of the surface of said land except the land covvered by the culm pile which has heretofore been sold to E. E. Hendrick." The lessees on their part agreed "to mine and remove all of the merchantable coal under the said described pieces of land which can, by the use of due diligence, be mined and removed." The lease was assigned in the same year (1903) by the lessees to the Finn Coal Company, one of the defendants in this case.

2. Prior to the leasing of the said coal land to Finn and Roderick in January, 1903, W. L. Barton was in possession and had been operating the mine, on a small scale, since 1897. On the same day that the lease was made to Finn and Roderick, Barton surrendered his lease to Watts and Scurry, giving them a bill of sale. Therefore we have three successive lessees of the said coal tract: Barton from 1897 to January 3, 1903; Finn and Broderick from January 3, 1903, to July, 1903, and the Finn Coal Company from the latter date to the present time.

3. The first substantial dispute arising from the evidence relates to the time of the origin of the fire complained of in plaintiffs' bill. Several witnesses testify that they saw indications of fire on the surface as early as March, 1902, when Barton operated the mines. These witnesses testify that they saw indications of fire on the surface as early as March, 1902, when Barton operated the mines. These witnesses say that Barton's fireman dumped hot ashes from the boiler into an opening left as the result of stripping the top vein of coal. The stripping had been done in part by a steam shovel, and the opening thus made was a convenient dumping ground for the ashes, cinders and refuse. It is testified that on wet days and at night the indications of a surface fire were apparent. Other witnesses state there was no fire, or any evidence of it, in 1902. W. W. Watt says he did not hear of the fire until 1905; Finn saw it for the first time in 1904, and Williams, the foreman, who had charge of the mine for a year from June, 1903, is very positive that there was no mine or surface fire while he was there. After considering this conflicting testimony we find as a fact that sometime in 1902, when

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Barton operated the mine, hot aches and cinders were dumped in the opening or depression of the surface caused by the stripping aforesaid and that the ashes coming in contact with other refuse produced a slight surface fire, which extended to the edge of some clum near by. The fire thus started in 1902 could have easily been extinguished. By the exercise of ordinary care and with very little effort during the Barton management, all danger from this surface fire could have been avoided. It was a slow, smouldering surface fire. It was not dangerous; it was not a nuisance.

4. The conditions during the year 1903, when Finn & Company operated the mine were about the same as in 1902. We are satisfied from the evidence that neither Finn & Company nor their foreman knew anything of the fire during the year 1903; nevertheless by the use of proper diligence they could have discovered a surface fire in that year, and they could easily have ascertained that there was danger of such a fire extending to the coal measures and thus developing a mine fire. The surrounding conditions favored such a result. The stripping of the top veins, the crevices and openings extending downwards, the nature of the inside workings, all tended to create a dangerous situation, and it should and could have been avoided. Barton in 1902, and Finn & Company in 1903, were chargeable with negligence.

5. In 1904 the fire developed rapidly. It became a mine fire as well as a surface fire, and from that year to the time when the present suit was brought, and up to the time of the hearing, the fire has become a serious danger to the community in the neighborhood of the mine. The fire spreads at an alarmingly rapid rate and now covers seven acres or more. It threatens the health of the people living on the contiguous territory; it will soon affect the safety of their dwelling houses and it depreciates the value of their properties. In other words, the fire has not only ruined the mine, but it is a nuisance to the public at large.

6. What was done towards extinguishing the fire, or towards arresting its progress and confining it within a limited area? In 1905 Finn and Company made some efforts to cut off the fire, but there was no effort on a large scale made until 1906. Then the company consulted a mining engineer and a plan was suggested and agreed upon.

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The company also had a conference with some of the lessors, who agreed to contribute, and did contribute, the sum of $2,000, as a voluntary contribution, to assist Finn & Company in the expense of putting out the fire. The plan adopted was to dig a large ditch outside of the fire zone, so as to confine the fire within certain limits and allow it to burn itself out. Work on this ditch was begun in the summer of 1906 and was continued to January, 1908, when it was abandoned. A sum of about $30,000 was expended in the work. The plan or scheme undoubtedly, was a proper one and it ought to have been effective to accomplish the purpose intended; but it failed for reasons that are not clearly stated in the evidence. It is fair to infer, however, that it failed for one of three reasons, or for all combined. Either the ditch was started too near the fire zone; or, the ditch was not carried to a sufficient depth to cut the lower vein, which probably was on fire at some period of time while the work was being done; or, the fire on one side of the ditch at the bottom was carelessly allowed to creep or cross over to the other side. It is not now material to determine the reason why the plan failed. The only material fact is that it did fail, and that the fire has since become a serious menace to the public.

7. There has not been at any time since the fire started any duty cast or resting upon W. W. Watt, one of the defendants, to put out the fire. The fire is dangerous because it is a mine fire. The burning coal underneath the surface, fed by the drafts from the many openings and crevices, is a seething furnace, throwing off noxious gases and vapors. In mining parlance the fire is a mine fire, and because of this it is a nuisance. It is true that there was a slight surface fire in 1902 under Barton, and that in 1903, or possibly not before 1904, it crept slowly until it communicated with the coal and then became a serious source of danger; but, if the fire had remained a surface fire only, it would be but the work of a few days to extinguish it. (Plaintiffs claim that the lessors had some control over the surface from the beginning and that they have been negligent in permitting the fire to spread unmolested through and over the surface.) We do not agree with the plaintiffs in this cotnention. The lessors leased to Finn and Roderick not only all the coal upon and under the surface, but the right to occupy all the surface for any purpose connected with the mining of the coal, except

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the land under the culm pile, which culm had been sold to E. E. Hendrick. This is no reason, and we know of no other reason, why the defendant Watt should be called upon to put out the fire, which as a fact, physically, is one fire—a mine fire. Reference has been made in the testimony and in the argument of counsel to some culm on the surface, to which the fire extended, and the argument is made that because this culm and the land under it were not the property of the lessees, therefore somebody else, the lessors in this case, had a duty imposed upon them to abate the fire nuisance. The evidence is not clear as to the culm, except as to the one fact that there is culm on fire. There is testimony as to the culm which accumulated during Barton's time, and there must have been an accumulation of culm under Finn & Company. There is also the Hendrick's culm pile. Whatever culm is on fire, there can be responsibility on account of it chargeable to the defendant W. W. Watt. This conclusion eliminates W. W. Watt out of this case.

8. Subject to our further consideration of its relevancy, evidence was admitted as to the feasibility and expense of putting out the fire, or of confining it within certain limits so that it may finally exhaust itself. An offer was made at one time by Mr. Lynch to put out the fire at the cost of $55,000. It will cost now, he says, $80,000. Other estimates are given by mining engineers. Our conclusion is that the fire can be extinguished, or arrested, and the nuisance abated at a cost of $75,000. Several methods of putting out the fire are suggested. One is by cutting it off, digging a ditch; another, by the use of water and a clay pack, and another by the use of carbolic acid gas. The proper method is a question of expert judgment on the part of mining engineers. We are not called upon now to pass upon the question of the best method. We do not think it is a question for the court at any time. Nor are we concerned at present with the expense; but at the request of counsel we have formulated this eighth finding of fact.

9. There is no escape from the conclusion that the sole responsibility for the fire rests on Finn & Company. Barton was undoubtedly careless in 1902, but he is not a party to this case. As we have stated already, Finn & Company at a moderate expense, could have prevented the progress of the fire in 1903. It was a work of small moment at that time. And when the first attempt was made to put out the fire, in 1904

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or 1905, it failed for the want of good judgment and the due prosecution of the work. We have already discussed the more elaborate attempt begun in the summer of 1906. Our final conclusion is that Finn & Company are bound under the law to abate the nuisance complained of in this case.

We shall now proceed to answer the various requests for findings of fact. They refer to some questions which are not included in our own conclusions. They were omitted because we have not considered them relevant.

PLAINTIFFS' REQUESTS FOR FINDINGS OF FACT.

1. The fire had its origin before 1903, while Barton was mining coal upon the tract, and has burned continuously since that time.

Answer: For answer to this request we refer to our third finding of fact.

2. At present and when the bill was filed, this fire constitutes a nuisance, and is a menace to the plaintiffs and the people at large in the vicinity of it, involving both the health and property of these people.

Answer: We so find.

3. W. W. Watt had actual notice of the existence of a fire upon this property prior to January 1, 1903.

Answer: Refused.

4. It is possible and feasible to extinguish this fire by employing proper methods.

Answer: We so find.

5. It is necessary to do work both upon the surface and in the mine workings in order to extinguish the fire.

Answer: Our judgment is that work must be done on the surface as well as in the mine whatever method is adopted to put out the fire.

6. There has been negligence established as to W. W. Watt, in failing to take proper steps to put out the fire.

Answer: Refused.

7. There has been negligence established as to the Finn Coal Company, in failing to take proper steps to put out the fire.

Answer: We so find.

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REQUESTS OF W. W. WATT, ONE OF THE DEFTNDANTS, FOR FINDINGS OF FACT.

1. That on January 3, 1903, W.W. Watt, et. al., owners of the premises upon which the alleged unisance exists, demised the same to Wade M. Finn and Edward Roderick, since which date said tenants or their sub-lessee, the Finn Coal Company, have been in exclusive possession and control of said premises.

Answer: We so find.

2. That on or about the date of said lease the said W. W. Watt and his co-owners surrendered possession of said premises to their tenants as aforesaid, and since that time have exercised no right or claim to the possession of said premises, or any part thereof.

Answer: We so find.

3. That since the date of said demise, the defendant, W. W. Watt, has never been upon the aforesaid premises.

Answer: We so find.

4. That at the date of said demise and at the time of said lessees entering into possession and assuming control thereof, no nuisance existed upon the said premises, and no condition existed which was calculated to produce injury to adjoining owners or the public at large.

Answer: We find as requested. The slight surface fire in 1903 did not amount to a nuisance.

5. That even if a fire existed on said premises in a culm bank thereon at the date of the demise, it was of such small proportions and of such a character as not to constitute a nuisance; that the conditions were not such as to charge the lessors with notice that the fire might subsequently spread, attain alarming proportions and produce injury to adjoining owners and others, thus constituting the same a nuisance.

Answer: We so find.

6. That the defendant, W. W. Watt, and his co-lessors were guilty of no negligent act in connection with said fire, but that while they were in possession and control of said premises, the fire, if any existed, was confined to a small area, was productive of no injury to others, and, provided it had been confined within the limits existing at the date of the demise, would have been productive of no injury to others.

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Answer:: We find as requested except that it does not appear that W. W. Watt and his co-lessors "were in possession and control of said premises" for any length of time. The surrender of the lease by Barton, the bill of sale from Barton to the lessors and the lease to Finn and Roderick, were practically one transaction, consummated on the same day.

7. That the defendant, W. W. Watt, did not know or learn that this fire existed on said premises until the year 1905, over two years subsequent to the date of said demise and after the lessees had gone into possession.

Answer: While there is evidence to the contrary, after weighing all the evidence we find as requested.

8. That the fire, which it is alleged now exists as a nuisance upon said premises, did not exist thereon at the date of the demise as aforesaid, or at the time the lessors surrendered possession and control of said premises to their tenants as aforesaid.

Anwer: We find as requested. Whatever fire existed before 1903 was slight. For a fuller answer to this request we refer to our third finding of fact.

9. That after the date of said demise and at a time when the fire existing on said premises had spread and was becoming a source of danger, the defendant, W. W. Watt, at the solicitation of the Finn Coal Company, contributed two thousand dollars towards suppressing said fire, and the said Finn Coal Company did thereupon contribute other large sums of money toward said object and did proceed to dig a ditch, cutting off the fire from the adjoining area.

Answer: We find as requested.

10. That if the said Finn Coal Company, the tenants in possession, had thereafter properly watched the said fire and prevented it from spreading, it would not have grown into a nuisance and become a source of danger.

Answer: We find as requested.

1. That under the terms of the demise as aforesaid the said lessors had no right to enter upon said premises for the purpose of waching the fire, preventing its spreading or for the purpose of sup-

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pressing the same in the coal and mining operations owned and controlled by said lessees.

Answer: We cannot say that the lessors had no right to enter upon the premises for the purpose stated, but we do say that under the facts of this case there was no duty imposed upon them to do so.

12. The fire constituting the nuisance in this case is a mine fire existing in the coal operations and the veins of coal owned by the Finn Coal Company, lessees under and by virtue of a lease, which operated as a sale of the coal in place.

Answer: We find as requested.

13. The proximate cause of the nuisance, alleged to exist, was the negligent act of said lessees, the Finn Coal Company, in failing to suppress the aforesaid fire and in failing to watch the same and prevent it from spreading.

Answer: We find as requested.

14. The injury could have been prevented by reasonable care on the part of said tenants.

Answer: We find as requested.

15. The aforesaid fire has now attained such large proportions that it is beyond the power of one man to suppress the same, and it would require the employment of many men and the expenditure of a large amount of money to so extinguish said fire.

Answer: We do not consider the conclustion in this request relevant, although the evidence sustains it.

16. No act on the part of the defendant, W. W. Watt, or his co-lessors, was the proximate course of the aforesaid nuisance, nor did said W. W. Watt, or his co-lessors, by any act or failure to act on their part contribute to produce said nuisance.

Answer: We so find.

REQUSTS OF THE FINN COAL COMPANY FOR FINDINGS OF FACT.

1. The Finn Coal Company was incorporated on the 16th of May, 1903, with a capital stock of twenty-five thousand dollars, which was subsequently increased to thirty-five thousand dollars, which was the capital stock of the corporation at the time of filing the bill and at the present time.

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Answer: We find as requested, although we do not consider the facts stated relevant.

2. The Finn Coal Company entered into possession of the premises described in the leases and the assignments thereof, which are referred to in the complainants' bill, on the 23rd of July, 1903, and prior to that time conducted no mining operations upon the lands and premises described in the leases above referred to.

Answer: We find as requested.

3. That in the year of 1901 or 1902 a certain culm pile on the surface of the premises described in the coal leases of the Finn Coal Company was discovered to be on fire, which fire has constantly increased in proportion and area from that time up to the present time.

Answer: We refuse to find as requested and for a further explanation of our refusal we refer to our third and seventh findings of fact.

4. That W. W. Watt, or the lessors, never made any effort to extinguish, confine or suppress said fire, except a contribution of two thousand dollars due them on royalties by the Finn Coal Company made to the Finn Coal Company in its efforts to suppress, extinguish and confine said fire.

Answer: We so find.

5. That the Finn Coal Company has spent in the neighborhood of thirty-five thousand dollars in its efforts to suppress, confine and extinguish said fire.

Answer: The sum expended was from $30,000 to $35,000.

6. That the Finn Coal Company has invested in said property over one hundred thousand dollars and owns no other property except its leasehold right to a small piece of ground upon which its breaker is erected and is now unable, and has been for sometime past, to operate said colliery and breaker on account of the fumes, gases, smoke and heat of said mine fire.

Answer: The evidence establishes the facts stated in this request. They are not material.

7. That the said Finn Coal Company have used all methods usually adopted in cases of this knd to extinguish and confine said fire that seemed to them either practical, possible or feasible.

Answer: Refused.

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8. That the said Finn Coal Company since it has been in possession of the premises have made diligent, skillful, feasible and practicable efforts at large expense to check the spread of the fire and to confine, suppress and extinguish it and have failed to accomplish the purpose.

Answer: Refused as requested. We cannot say that Finn and Company have been diligent in its efforts to suppress the fire.

9. That said fire is so dangerous and so destructive and has reached such magnitude and proportions that it will need exceptional skill and ability of a person experienced in the business to confine, suppress and extinguish the fire at the present time.

Answer: We find as requested, except that the skill and ability needed to suppress the fire cannot be termed "exceptional."

10. That whoever undertakes to suppress, confine or extinguish said fire will have to constantly supervise the same and be prepared at all times to exercise judgment, discretion and skill to accomplish the purpose.

Answer: We so find.

11. The Finn Coal Company never claimed to own the culm bank in which the fire started and never exercised or attempted to exercise any claim of ownership in it.

Refused. For a further answer we refer to our seventh finding of fact.

12. The lessors by W. G. Scurry, who is a part owner and acting as agent for the others, claim title to the culm bank in which the fire started and claim that title to it did not pass by the lease to Finn and Roderick assigned to the Finn Coal Company.

Answer: Refused. See seventh finding of fact.

13. There is no merchantable coal in the two top veins in which the fire was at the time of the filing of the bill in this case.

Answer: This fact is not clear in the evidence. We refuse to find as requested.

14. There is a difference of opinion between the engineers and other witnesses called by the parties as to whether the fire should be confined where it is or extinguished or suppressed and they do not agree on the method to be adopted for the accomplishment of any purpose.

Answer: Refused because irrelevant.

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15. The Finn Coal Company is without means or resources at the present time upon which it can raise money to confine, suppress or extinguish said fire.

Answer: Refused.

16. The property of the Finn Coal Company at the present time is of practically no value on account of this fire.

Answer: Refused.

PLAINTIFFS' REQUESTS FOR CONCLUSIONS OF LAW.

1. As the fire existed upon this tract before W. W. Watt executed a lease to Finn and Roderick, and as he has since that time (with his co-owners) had sufficient control of the surface to use it for the purpose of extinguishing the fire, the duty was imposed upon him to use proper steps to put out this fire.

Answer: Refused.

2. W. W. Watt could not relieve himself from liability to the plaintiffs, by transferring title to a part or all of the tract after the fire developed upon it.

Answer: The proposition that an ower of property cannot relieve himself from liability for a nuisance, or for that which may grow into a nuisance, by transferring title, is a well recognized principle of law and should be applied when its application is justified by the facts. Under the facts of the case at bar, as found by us, the request is refused.

3. It is not material as affecting the liability of W. W. Watt that the fire had not yet become a public nuisance when he executed the lease to Finn and Roderick.

Answer: The same answer is made to this request.

4. A joint lability exists upon the part of W. W. Watt and the Finn Coal Company, to extinguish the fire and abate the nuisance.

Answer: Refused.

5. A mandatory injunction should issue directing W. W. Watt to extinguish the fire and abate the nuisance complained of.

Answer: Refused.

6. A mandatory injunction should issue directing the Finn Coal Company to extinguish the fire and abate the nuisance complained of.

Answer: Affirmed.

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7. A mandatory injunction should issue directing W. W. Watt and the Finn Coal Company to extinguish and check the spread of this fire and abate the nuisance complained of.

Answer: Refused.

REQUESTS OF W. W. WATT, DEFENDANT, FOR CONCLUSIONS OF LAW.

1. The owners of the property on which it is alleged a nuisance exists in this case, namely, W. W. Watt and his co-tenants, having surrendered possession and control of said premises to their tenants under a demise executed before the alleged fire constituted a nuisance, and said tenants having entered into the exclusive possession and control of said premises prior to said date, no responsibility for said nuisance attaches to said W. W. Watt and his co-tenants.

Answer: The conclusion in this request is affirmed, partly for the reasons therein stated, but more especially for the reasons stated in our findings of fact.

2. Even if a fire existed on said premises prior to the date of said demise, considering the extent and character thereof, it did not constitute a nuisance, and the owners of said premises were not at fault in allowing the same to exist thereon while in their possession, or on and after the date of the transfer of possession to their lessees.

Answer: Affirmed.

3. After the transfer of possession to said lessees, no duty rested upon said lessors to watch the fire and prevent it from spreading, to take any steps toward the suppression of the same.

Answer: Affirmed.

4. In order to hold a landlord responsible for a nuisance existing on demised premises it must be established that the nuisance existed at the date of the demise, or that such a condition existed as was calculated to produce a nuisance; that the landlord had knowledge of such condition, either actual or constructive; that the conditions were of such a character that a reasonable prudent man would anticipate danger therefrom, and that he failed to exercise ordinary and reasonable care with reference thereto.

Answer: Affirmed.

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5. A landlord is not responsible for failure on the part of his tenant to exercise care with reference to the property demised in the condition in which it is claimed, so that injury is inflicted upon others by the negligent act of such tenant.

Answer: Affirmed.

6. That after the defendant, W. W. Watt, had contributed the sum of two thousand dollars towards the suppression of this fire, at the solicitation of the Finn Coal Company, and the said Finn Coal Company had dug a ditch intercepting said fire and cutting it off from the surrounding area, no duty was cast upon the said W. W. Watt or his co-lessors to watch the said fire and prevent its spreading, and no duty rested upon said lesors to extinguish said fire or to contribute toward the suppresion thereof.

Answer: Affirmed.

7. The defendant, W. W. Watt, and his co-lessors are not, under the evidence in this case, chargeable with notice that the premises demised by them, as aforesaid, were in such a defective condition at the time of the demise as was calculated to produce injury to others.

Answer: Affirmed.

8. Even if said lessors knew that a fire existed on said premises, they are not to be held responsible even though they knew the source of danger, for it does not appear that they knew, or should have known, that danger existed; they were not bound to foresee or apprehend the results from a failure on the part of their lessees to watch and prevent the fire from spreading.

Answer: Affirmed.

9. Prima facie the occupier of premises is liable to third persons for damages arising from any defect therein, and responsible for any nuisance existing thereon, and the burden is upon those seeking to charge a party out of possession with responsibility to show that a condition existed at the time said party surrendered posession which was in its very nature and essence a nuisance, or must in the nature of things become a nuisance under ordinary circumstances.

Answer: Affirmed.

10. It would be inequitable in the present case to hold the defendant, W. W. Watt, one only of three joint owners of the aforesaid

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premises, responsible for the creation or maintenance of such alleged nuisance and subject him to liability therefor.

Answer: If the facts of the case justified us in holding W. W. Watt responsible it would not be inequitable to do so. The request is refused.

1. That the present bill should be dismissed as to the defendant, W. W. Watt.

Answer: Affirmed.

REQUESTS OF THE FINN COAL COMPANY FOR CONCLUSIONS OF LAW.

1. The plaintiffs are not entitled to the relief prayed for in their bill under the pleadings and proofs in this case.

Answer: Refused.

2. A mandatory injunction cannot be awarded as prayed for in the complainants' bill for the reason that it will require the performance of various and continuous acts and the exercise of special skill and judgment, and the execution of such a decree would require such constant superintedence by the court as to make judicial control of the decree impossible and ineffectual.

Answer: Refused.

3. The court could not carry into effect any decree which it might make in this case without exercising some personal supervision and oversight over the work to be done and extending over a considerable period of time.

Answer: Refused.

4. That the plaintiffs have a full, adequate and complete remedy at law.

Answer: Refused.

5. The Finn Coal Company being financially unable to provide means to confine, suppress or extinguish the fire a decree against them would be incapable of execution or performance.

Answer: Refused.

CONCLUSIONS OF LAW BY THE COURT.

Having answered three sets of requests for conclusions of law we shall here give only the formal conclusions necessary for the orderly disposition of the case.

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1. The bill should be dismissed as to W. W. Watt, one of the defendants.

2. A mandatory injunction should issue against the Finn Coal Company, directing it to abate the nuisance complained of in the plantiffs' bill.

3. Finn and Company should pay the costs of the case.

DISCUSSION.

The questions of law involved in the consideration of this case do not require elaborate discussions. We shall refer to them briefly.

1. THE NUISANCE. It is clear, and it is admitted, that the nuisance caused by the mine fire, not only affects the public in a considerable part of this city of Carbondale and is a special injury to the plaintiffs as well, but that it is of a propressive and alarming character. We have found this as a fact. While the question of care or the want of care on the part of the Finn Coal Company in its efforts to control and suppress the fire may not be an element to be considered in the determination of the present controversy, the fire being a nuisance per se; nevertheless, we have found definitely that the defendant company was negligent in permitting the fire to exist at all and in failing to make diligent efforts to suppress the fire or to confine it within safe limits. We find in a case somewhat analagous to the present one, McCally v. Clarke and Thaw, 40 Pa., 399, an action for damages, that it was submitted to the jury on the question of the defendant's negligence.

2. THE LIABILITY OF W. W. WATT, DEFENDANT. We have found as a conclusion of law that the bill should be dismissed as to W. W. Watt. There is no principle of law that will hold him liable under the facts of this case. Our attention has been called to such cases as Knauss v. Brua, 107 Pa., 85; Fow v. Roberts, 108 Pa., 489, and Wunder v. McLean, 134 Pa., 334, wherein it is held that an owner of a property cannot escape liability for an existing nuisance thereon, or for something existing that would by use develop into a nuisance, by demising it to a tenant and putting him in possession. This principle is recognized in many cases and should be applied when the proper facts are before us. The evidence in the present case fails to disclose any state of facts which would make W. W. Watt liable for the nuisance. He knew nothing of the fire until 1905, and whatever surface

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fire existed in 1902 it was of so slight and insignificant a character that Finn and Company did not discover it until sometime in 1904. We believe that in the exercise of ordinary care Finn and Company could have discovered and suppressed the fire before 1904 and before it became dangerous and a nuisance; but we know of no way by which W. W. Watt, or his co-lessors, can be compelled to share in the responsibility which rests solely on Finn and Company.

3. THE POWER OF THE COURT TO MAKE A DECREE. It is claimed on the part o fthe defense that we cannot make a decree in this case, because the execution of the decree would require the personal and continuous supervision and oversight of the court for a long period of time. Several cases are cited to sustain this proposition. We do not agree with the defense in this contention. When a final decree shall be made, if our conclusions are valid, it will be to the effect that Finn and Company shall proceed forthwith and with due diligence to abate the nuisance by suppressing the fire, or confining it within safe limits so that it shall cease to injure the plaintiffs and the public in their health and property. The execution of such a decree would require no supervision on the part o fthe court. The question of method would be left entirely to the defendant.

4. THE INSOLVENCY OF FINN AND COMPANY. The proposition is made on behalf of Finn and Company that a court of equity will not make a decree which cannot be enforced. This proposition is based on the alleged insolvency of the Finn and Company corporation. The mine of the company, the only property it has, is ruined. The company has expended three times its captital stock in the enterprise. It has no money and is hopelessly insolvent. Why then make a a decree directing this insolvent corporation to do something involving the expenditure of $75,000 more? It is claimed that such a decree would be oppressive and useless if made. We decline to consider this phase of the case now. We think that it would be premature to do so.

This ends our discussions of the case.

The prothonotary is directed to enter a decree *nisi* in accordance with our findings of fact and law and to give notice to the parties or their counsel.

Exceptions sec. reg.

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In the Court of Common Pleas of Lackawanna County.

No. 10, March Term, 1908.

In Equity.

Exceptions to Findings of Fact and Law.

John McCabe, et. al., vs. Watt and The Finn Coal Co.

There is abundant authority in support of the legal proposition which questions the power of a court of equity to make a decree which would involve continuous supervision on the part of a chancellor for a period of two or more years.

Messrs. Vosburg and Dawson and Messrs. Gramer & Horton for plaintiffs.

Messrs. O'Brien & Martin and Mr. H. C. Butler for Watt.

Mr. M. J. Martin, for defendant.

Opinion by Edwards, P. J., January 15, 1909.

Two sets of exceptions were filed in this case and argued before the court in banc. The plaintiffs' exceptions relate to the conclusion dismissing the bill as to W. W. Watt. There can be no question as to the law or the cases cited by plaintiffs' counsel. The difficulty is with the facts. Our findings of fact eliminate W. W. Watt out of the case. Nor can we, after argument and a further consideration of the evidence, change our conclusions. Therefore, plaintiffs' exceptions are overruled.

The argument of counsel for the Finn Coal Company was confined mainly to the exception questioning the power of a court of equity to make a decree which would involve continuous supervision on the part of a chancellor for a period of two or more years. There is abundant authority in support of this legal proposition; but we do not see how it is possible to apply the doctrine in the present case. It may be conceded that the work of suppressing the fire, or of confining it within safe limits, is a difficult undertaking and will involve great expense; but, the execution of our decree depends entirely on engineering skill and methods and the expenditure of money. The work will require no attention from the chancellor after the decree is made. The exceptions of the Finn Coal Company are overruled.

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FINAL DECREE.

This cause came on to be heard at a regular term of equity court, and was argued by counsel, and upon consideration thereof, it is ordered, adjudged and decreed as follows:

1. The bill of complaint is hereby dismissed as to W.W. Watt, one of the defendants.

2. A mandatory injunction is directed to be issued against the Finn Coal Company, the other defendant, commanding the said the Finn Coal Company to extinguish and suppress the fire and to abate the nuisance described in plaintiffs' bill.

3. The said the Finn Coal Company is ordered to pay the costs of the case.

One who, inerecting a structure over a public street, negligently permits a rope to hang across the street so low as to prevent the passage of a buggy with the top up, is held, in Pennsylvania Steel Co. v. Wilkinson (Md.) 69 Atl. 412, 16 L.R.A. (N. S.) 200, to be responsible for an injury to a traveler whose horse is frightened by the swinging of the rope as it is about to pass under it, whteher it is done by one of his servants, or by a stranger.

A trustee of several estates who keeps the effects belonging to all in one bank account and the securities in one box is held, in French v. Hall (Mass.) 84 N. E. 438, 16 L.R.A. (N. S.) 205, to be able to effect a sale of a mortgage from one estate to another by entry in his books without a formal assignment of the mortgage and indorsement of the note secured thereby.

A passenger injured while in the exercise of ordinary care for his own safety, by being thrown by the motion of the car from a platform to which he had been removed by the conductor because, in consequence of sickness, he was offensive to other passengers, is held, in Chesapeake & O. R. Co. v. Crank (Ky) 108 E. W. 276, 16 L.R.A. (N. S.) 197, to be entitled to hold the carrier liable for the injury.

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In the Court of Common Pleas of Lackawanna County.

No. 1677, September Term, 1907.

Rule for a New Trial and Rule for Judgment Non Obstante Veredicto.

Thomas H. Jones vs. The Marion Coal Coal Company.

It is a familiar rule that in the management of the affairs of a corporation all of the directors must be notified of the meeting, for the advice of each director may be essential, though they do not unite in opinion.

It is the right of the minority to meet the majority, and, by discussion and deliberation to bring them over, if possible, to their own views.

Suit was brought, not for failure to sell and transfer property, but for defendant's refusal to give an option to purchase. Plaintiff insisted he must have good title to the property, and he would not accept it until his attorney should have examined the title. It was not shown that upon such examination he would have found it satisfactory and accept the property.

Held: Plaintiff cannot recover unless it is made to appear that the option, if delivered, would have been of some value to him. If he had shown that upon obtaining the option he could have sold it for an advance, or in some other way reap an advantage therefrom, such damages would have been recoverable.

Mr. C. P. O'Malley and Messrs. O'Brien & Kelly, for plaintiff.

Mr. M. J. Martin, for defendant.

Opinion by Carpenter, A. L. J., January 2, 1909.

The plaintiff's claim in this case, as set forth in his statement, is for damages for the breach of an agreement by the defendant company, in consideration of one dollar, to execute a certain option herein the defendant should agree within two weeks to sublet to the plaintiff all rights of said company in a lease of a culm pile, made by Isaac Feltz and assigned to defendant company; and wherein said defendant should further agree to sell and deliver, within the said period of two weeks, machinery and personal property of the Marion Coal Company, held by said company for the purpose of working the premises mentioned in said lease; when and at such time within said period of two weeks the said Jones should pay said company the sum of fifteen thousand dollars to apply in part payment of said property; the said Jones to further agree to pay the balance, $2,500.00, within one year; and further to assume the duties of the lessors, and to pay the defendant a royalty of fifteen cents per ton on coal marketed.

The plaintiff avers that the defendant well knew that he held the said sum of $15,000.00 for the purpose aforesaid, and was willing and

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ready to pay the same and to assume the sublease, etc.; and that on March 15, 1907, he tendered to defendant one dollar and demanded the option; but the defendant refused to deliver the same, and thereby he was damaged.

It appeared by the evidence that the defendant company was organized under the laws of the state of Delaware, and was duly authorized to do business in the state of Pennsylvania. Its board of directors was composed of four members, one of whom resided in Wilmington, Delaware.

The agreement upon which the suit is based was alleged to have been made at a meeting on or about January 25, 1907, held at the residence of the President of the company, for the reason that he was too ill to leave him home. There were present at the meeting the three resident directors, and Mr. F. E. Donnelly, who was attorney for the company, and also a stockholder; together with the plaintiff and his attorney, Mr. W. J. Fitzgerald. The four members of the company present owned about 90 to 95 per cent. of the stock. The non-resident director had no notice of the meeting. The meeting was entirely informal; no motions were made or submitted for the action of the board of directors; and no minutes were kept or made.

It may well be doubtful whether an agreement made under such circumstances and in such manner, to dispose of such property of the company, would be binding upon the corporation. The by-laws of the company provide that: "Special meetings of the board may be called by the president on three days' notice by mail or personally to each director."

In Moller vs. Fibre Co., 187 Pa., 553, it was held that, a resolution authorizing the assignment of certain insurance policies passed at a meeting of the directors of a corporation, of which meeting two of the directors did not have timely notice, is voidable. Nothing appears in this case which could be treated as acquiescence in or ratification of the action of the three directors; and now when the plaintiff seeks to enforce it the corporation repudiates it and defends upon this ground. It is a familiar rule that in the management of the affairs of a corporation all of the directors must be notified of the meeting, for the advice of each director may be useful though they do not unite in opinion.

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Twelfth Street Market Co. vs. Jackson, 102, Pa., 269; Allegheny Workhouse Co. vs. Moore, 95 Pa., 408; Pike County vs. Rawland, 94 Pa., 238.

It is the right of the minority to meet the majority, and, by discussion and deliberation, to bring them over, if possible, to their own views. Rittenhouse's Estate, 140 Pa., 172.

There is another difficulty with the plaintiff's case which, to my mind, is fundamental and controlling. The subject matter for which he was negotiating was the lease of the culm pile and the improvements erected by the defendant. This is apparent from all the evidence in the case. The attorneys engaged in the transaction had, before the meeting, prepared papers setting forth their ideas of the manner in which the deal should be carried out. These included minutes, not only of a directors', but a stockholders' meeting; and the so-called option which was to be executed on the part of the company was as follows:. "Now, —— day of February, 1907, in consideration of one dollar to it in hand paid by Thomas H. Jones, the receipt whereof is hereby acknowledged, the Marion Coal Company hereby covenants and agrees two weeks from the date hereof, to execute and deliver to said Thomas H. Jones, the annexed assignment of lease of coal property situated in Taylor, Pennsylvania, and the bill of sale of personal property hereto annexed, upon payment of the sum of $15,000.00 in cash or certified check on any bank of Scranton Pa., to the said Marion Coal Company by said Thomas H. Jones."

But the plaintiff insisted that he must have a good title to the property, and he would not accept it until his attorney should have examined the title. But there is nothing in the case to indicate that upon such examination he would have found it satisfactory and accepted the property; and I am unable, therefore, to see wherein he has shown that he has been damaged. He never signified his willingness to take the property; he made no tender of the purchase money, nor offer to accept an assignment of the lease. He did, indeed, tender a dollar and demand an option some two months after the date when he claims the agreement was made. And his suit is brought, not for failure to sell and transfer the property to him, but for defendant's refusal to give him an option to purchase it. But how can he recover for this unless

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it is made to appear that the option, if delivered, would have been of some value to him? If he had shown that upon obtaining the option he could have sold it for an advance, or in some other way reaped an advantage therefrom, such damages would have been recoverable. But the damages he claimed, and which he showed by his evidence, were based wholly upon the loss of the profit which might be expected to result from receiving the property and disposing of it. But this presupposes that he would have found the title satisfactory and have accepted the property. This element of his case was entirely lacking and it follows that there was no evidence to support the verdict.

And now, January 2, 1909, the rule for a new trial is discharged. The rule for judgment non obstante veredicto is made absolute and judgment is now entered for the defendant.

Same day an exception is granted to the plaintiff.

A right granted by statute to the "suriviving father" or "mother" to recover damages for the death of their son is held, in Mount v. Tremont Lumber Co. (La.) 46 So. 103, 16 L.R.A. (N. S.) 199, to be a right granted to the actual father or mother of the child, and not to an adopting parent.

The measure of damages in an action brought after expiration of a term, for breach of covenant by a tenant to keep the premises in repair, is held, in Appleton v. Marx, 191 N. Y. 81, 83 N. E. 563, 16 L.R. A. (N. S.) 210, to be the cost of putting them into repair.

The liability of a master for an act of his superintendent which is the subject of performance by ordinary subordinate empolyees, and includes no element of superior duty, supervision, or command, is nenied in Gallagher v. Newman, 190 N. Y. 444, 83 N. E. 480, 16 L.R.A. (N. S.) 146, under a statute imposing liability upon the master for the death of his servant where the injury is caused "by reason of the negligence of any person in the service of the employer, intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence."

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